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# Are Copyright Firms Incentive Intermediaries?

Kelly Trimble\*

*Copyright scholarship has long condemned the Copyright Term Extension Act for failing to significantly increase authors' incentive to create. Economic and psychological data combine to suggest that the increased reward supplied by the twenty-year term extension is too temporally distant to have any effect on individuals' decisions in the present. However, a small body of empirical research suggests that term extensions do lead directly to some increases in creative production. This Comment explores one possible explanation for the discrepancy between theory and practice by distinguishing individual authors from creative firms. Individuals are subject to heuristics that diminish their ability to forecast the future and reduce their valuation of the term extension's reward. Corporate decisions are not necessarily guided by such heuristics; consequently, creative firms may be influenced to produce works of art by different incentives than those that influence individuals.*

*Term extensions may thus provide an incentive for corporate producers even if their incentive effect for individuals is negligible. This Comment argues that firms, which are more responsive to term extensions, may be able to act as incentive intermediaries by passing along the greater value of a longer-term copyright. Faced with a more valuable copyright term, firms may either pay more for works up-front or use the increased profitability to offer additional opportunities for individuals to sell their works. There is limited evidence showing that firms do act this way; instead, it appears that they keep any additional profits as windfalls. As a result, society must decide whether incentivizing firm authors is as valuable a benefit of legislation as incentivizing individual authors.*

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I. INTRODUCTION

The Sonny Bono Copyright Term Extension Act of 1998 (CTEA) was a landmark piece of legislation that lengthened the duration of copyright protection by twenty years.<sup>1</sup> Like most components of copyright law, the copyright term—a specified period of time during which the author has the exclusive right to exploit the work—is ostensibly intended to incentivize creation.<sup>2</sup> Copyright is conventionally under-

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<sup>1</sup> Sonny Bono Copyright Term Extension Act, Pub. L. No 105-298, § 102, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).

<sup>2</sup> This purpose stems from the original copyright clause in the U.S. Constitution, which allows Congress to enact legislation “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.” U.S. Const. art. I, § 8, cl. 8. I do not argue in this Comment that the utilitarian incentive theory of copyright is justified or realistic. Rather, I accept it as a starting point for my analysis because it continues to be widely cited and accepted by courts and legislators. See, e.g., Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 142 (2011) (“The statement that the purpose of copyright is to furnish incentives for authors has attained the status of a rote incantation.”); Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1746-51 (2012) (analyzing theories of intellectual property and the incentive justifications for them).

stood as conferring a temporary monopoly over a creative work; the scope of this protection is weighed against the public interest in having free access to and use of creative works.<sup>3</sup> It is commonly accepted that copyright requires a tradeoff between the author's entitlement to exploit his or her work and the public interest.<sup>4</sup> Because copyright imposes costs on society by limiting access to and use of creative works, increased copyright protection should only be allowed insofar as it provides additional benefits that outweigh the additional costs.<sup>5</sup> One such benefit is increasing the appeal of creation by giving authors exclusive rights to their works, thereby incentivizing additional creation and expanding the pool of art available to society. From a purely durational standpoint, this means that an optimal copyright term would incentivize more creation than it prohibits or deters.<sup>6</sup>

Prominent members of the copyright industries, including film executives and even some iconic musicians, testified before the U.S. Congress that an increased incentive effect could be achieved by enacting the CTEA to extend the copyright term.<sup>7</sup> Over objections from other prominent artists, psychologists, and economists who argued that a longer copyright term would not stimulate creation, Congress granted the term extension in 1998.<sup>8</sup> A case was promptly brought to challenge the CTEA's constitutionality on the grounds that extending the term for

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<sup>3</sup> See, e.g., Marvin Ammori, *The Uneasy Case for Copyright Extension*, 16 HARV. J.L. & TECH. 287, 320 (2002) ("[C]opyright's ability to promote arts and sciences is predicated on achieving a proper balance of economic incentive to authors and monopoly costs.").

<sup>4</sup> This access-tradeoff balance is at the heart of an ongoing debate about the appropriate extent of monopolization versus a robust public domain. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989) ("Striking the correct balance between access and incentives is the central problem in copyright law.").

<sup>5</sup> The temporary monopoly granted by copyright protection creates the same costs to society as any other monopoly. For example, it allows rightsholders to charge supracompetitive premiums for access to their works and limits subsequent creators' ability to access, use, and build on those works. See, e.g., Fromer, *supra* note 2, at 1752; Genevieve P. Rosloff, "Some Rights Reserved": *Finding the Space Between All Rights Reserved and the Public Domain*, 33 COLUM. J. L. & ARTS 37, 45-52 (discussing the detrimental effects that overly-broad copyright protection has on the public's ability to use and benefit from creative works). See generally Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 325 (1970); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285-87 (1996).

<sup>6</sup> Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 520 (1990) ("Under the economic copyright model, the propriety of copyright's expansion rests solely on an economic cost-benefit calculation. Courts should allow copyright to expand as long as the benefits of increased creative activity outweigh its costs.").

<sup>7</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 207 n.15 (2003) (listing various artists who testified in support of the term extension).

<sup>8</sup> H.R. REP. NO. 105-452 at 2-3 (1998).

existing copyrights went beyond the scope of Congress's power under the Copyright Clause.<sup>9</sup> Many of the arguments that were made before Congress about the extension's negligible incentive effects were repeated before the U.S. Supreme Court. The *Eldred v. Ashcroft* decision, however, favored the argument made by the copyright industry: the Court found that Congress was within its rights to enact the legislation in spite of its apparently dubious incentive effects.<sup>10</sup>

Since the enactment of the CTEA and the *Eldred* decision upholding the legislation, scholars have sought to disprove the idea that lengthening the copyright term will incentivize significantly more creation.<sup>11</sup> The argument for a longer term of protection is that it affords the author more time to exploit a work in order to recoup initial costs and ultimately to realize a profit. Consequently, investing in creation carries less risk, which leads to more investment, more creation, and broader dissemination. However, insights from a variety of disciplines suggest that this expected sequence might be flawed. Scholars decrying the expansion of copyright protection use psychological and economic theories to show that the relative income derived from the additional years of copyright protection is insufficient to significantly influence authors' decisions to create.<sup>12</sup> Although more protection may offer additional incentives up to a point, these incentives diminish in value as realization of the reward becomes more temporally distant. As such, these scholars contend that increasing the copyright term

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<sup>9</sup> *Eldred*, 537 U.S. at 193. The petitioners also argued that the CTEA violated the First Amendment. *Id.* at 196. Petitioners attempted to maintain a distinction between the extension for existing works (to which they objected) and the extension for new works (which was not a part of the constitutional challenge). *Id.* at 211-12; *id.* at 218 n.23. Although the Court rejected Petitioners' arguments, the policy considerations behind the prospective extension were in the background of the decision, having been discussed at oral arguments, presented by amici in briefs, and addressed by Justice Breyer in his dissent. *See id.* at 244 (Breyer, J., dissenting). *See also* Transcript of Oral Argument, *Eldred*, 537 U.S. 186 (2003) (No. 01-618).

<sup>10</sup> *Eldred*, 537 U.S. at 222 (majority opinion) ("Beneath the facade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA's long terms. The wisdom of Congress's action, however, is not within our province to second-guess. [We are] [s]atisfied that the legislation before us remains inside the domain the Constitution assigns to the First Branch . . .").

<sup>11</sup> *See, e.g.*, Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1169 (2000); Lawrence Lessig, *The Balance of Robert Kastenmeier*, 2004 WIS. L. REV. 1015, 1021 (2004); Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN. L. REV. 1, 73 (2001).

<sup>12</sup> Note that any income attributable to the extended term will not become available until long after the author's death because the term was extended from author's life plus fifty years to author's life plus seventy years. 17 U.S.C. § 302(a), (b) (2006). For works made for hire, the term is the shorter of ninety-five years from publication or 120 years from creation. *Id.* § 302(c).

merely postpones the date when works will become accessible in the public domain without granting a counterbalancing societal benefit in the form of increased creation.

Despite the large volume of academic and popular criticism, one aspect of the 1998 copyright term extension has not been sufficiently analyzed by scholars. The copyright industry's position<sup>13</sup> in *Eldred* implied that some authors might respond differently to incentives than others.<sup>14</sup> On its face, this theory is not necessarily new; a number of scholars have already noted that financial incentives may positively influence some actors while simultaneously deterring others from engaging in the same behavior.<sup>15</sup> However, the copyright industry's focus on how it might positively respond to financial incentives implies a distinction between *types* of authors—not merely a variance in individual responses. Specifically, firms that engage in creative activity, such as film studios or publishing houses, might respond positively to increased term durations even if authors who are natural persons (instead of firms) do not.<sup>16</sup> Individual decisions about the future are constrained by psychological heuristics and a limited ability to undertake high-risk activities with temporally distant rewards,<sup>17</sup> such as investing in creation for a payoff more than seventy years into the future. Firms, on the

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<sup>13</sup> It is important to recognize that the copyright industry as a whole was divided about the value of the term extension; prominent industry players supported both sides of the debate. For simplicity, I use "copyright industry" here to refer to those entertainment firms and figures who strongly advocated for the term extension.

<sup>14</sup> For example, the MPAA, the Songwriters Guild of America, the Association of American Publishers, AOL Time Warner, Inc., and various individual artists all filed amici briefs in support of the CTEA, suggesting that the firms or their members would be responsive to the increased incentive. On the other hand, Intel Corporation, several smaller film studios, and various individual artists all filed amici briefs that opposed the extension, indicating that they found the increased term to be an unnecessary incentive.

<sup>15</sup> See, e.g., Samuel Bowles, *When Economic Incentives Backfire*, 2009 HARV. BUS. REV. 8b (explaining that people may respond negatively to economic incentives when the incentive sends a signal that the behavior is taking place for financial gain rather than for altruistic or "moral sentiment" reasons). *Contra* R. Eisenberger et al., *Effects of Reward on Intrinsic Motivation—Negative, Neutral, and Positive*, 125 PSYCHOL. BULL. 677, 686 (1999) (questioning theory that tangible rewards reduce intrinsic motivation).

<sup>16</sup> See *infra* Part II.A.

<sup>17</sup> See Florian Klapproth, *Time and Decision Making in Humans*, 8 COGNITIVE, AFFECTIVE & BEHAVIORAL NEUROSCI. 509, 509 (2008) ("Anticipating delays in realizing an option not only reduces the value of that option, but also alters its mental representation. For example, consequences occurring in the far future are represented with less detail than are consequences occurring in the near future."); Hal Ersner-Hershfield, *Thinking About Tomorrow: The Role of Time Horizons in Emotional Experience and Intertemporal Decision-Making 5-9* (June 2009) (unpublished Ph.D. dissertation, Stanford University) (discussing psychological theories about erroneous predictions contributing to poor future decision-making).

other hand, are not subject to the same psychological limitations and can thus make more economically rational decisions about creating works despite the delayed reward for their investment. Moreover, if copyright firms respond positively to the increased copyright term, they may be able to act as incentive intermediaries and pass the incentive along to individual authors.

Scholarship has not yet explored whether a meaningful difference exists between types of authors. It is potentially problematic that the incentive model presented and relied on in the vast majority of copyright literature considers only individual creators and essentially ignores the effect on corporate producers.<sup>18</sup> If scholars hope to discredit the incentive theory as a continuing justification for extensions to the copyright term, they need to address both individual and firm responses to the expansion and do more to explore the concrete outcomes of copyright expansions.

In this Comment, I add a new dimension to the debate about the copyright term extension by scrutinizing the disparity between firm and individual responses to copyright duration as an incentive.<sup>19</sup> Part II discusses the arguments against term extensions as incentives and outlines the incentive model submitted by CTEA opponents. In Part III, I

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<sup>18</sup> See Cohen, *supra* note 2, at 147 (“The extent to which the effects of copyright’s system of incentives for capital “trickle down” to authors is an important but so far unanswered question.”); Fromer, *supra* note 2, at 1779-81 (exploring the idea that incentives may operate differently for firms than for individuals, and encouraging future empirical research to help broaden understanding of incentive effects on different types of producers).

<sup>19</sup> This is merely one component of the necessary inquiry into copyright’s adequacy; a more sophisticated debate should also contemplate potential disparities in firm and individual responses to other features of copyright and to noneconomic incentives. My construction of the incentive universe is intentionally restricted to copyright duration and the effects that term extensions have on creation in order to keep my inquiry within the parameters of the ongoing debate about the legitimacy of the CTEA. For purposes of my synthesis of the debate, I assume that the copyright term represents a tangible financial award that could positively influence an author’s decision to create. This assumption may be artificial because it is not clear that copyright serves as an effective incentive for creation at all. Several researchers have identified ways that financial incentives act as deterrents rather than incentives to engage in specific behavior. The drive to create may be an intrinsic motivator that is quashed when external incentives are offered in its place. See generally Teresa M. Amabile, *Reward, Intrinsic Motivation, and Creativity*, 53 AM. PSYCHOLOGIST 674 (1998) (reviewing creativity research and arguing that creativity may often be undermined by extrinsic motivators such as financial rewards); Bowles, *supra* note 15. In addition, while I acknowledge that other features of copyright may also have various incentive effects, my focus in this Comment is on the duration element. Increasing the copyright term duration is a common legislative incentive tool, and each increase provokes academic squabbling over the ideal length. However, I do not wish to suggest that other features of copyright do not play an equally (or more) important role in incentivizing creation. In addition, I do not address whether incentives are necessary or whether public access should take precedence. Though these are important considerations, they are beyond the scope of this Comment.

present an alternative theoretical model that, if true, could support the proposal that copyright firms respond differently than individual authors to durational incentives. The model is not intended as a complete representation of firm behaviors; rather, it considers some of the most common arguments against term extensions and seeks to identify how firms might be distinct from individuals. I will also discuss the limitations and possible objections to this model, which may prove fatal in application. After concluding that the model does not support a meaningful distinction between individuals and firms as copyright creators, Part IV analyzes the sparse empirical research about responses to term increases that is available. This research suggests that there is some increase in creative activity attributable to copyright term extensions. While extremely limited, the research indicates that there is activity that might have potentially interesting normative implications even if the proposed firm-incentive model does not reflect reality. Finally, Part V presents some normative implications of firms' responses to incentives and suggests how the academic debate might better reflect those responses. Ultimately, scholars and policymakers must determine whether a disparity between firm and individual responses to incentives leads to the type of creative production that American society endorses.

## II. THE COPYRIGHT TERM EXTENSION ACT AND ITS DETRACTORS

In the CTEA, Congress extended the term of copyright protection by twenty years (from life plus fifty years to life plus seventy years for works by natural individuals and from seventy-five years to ninety-five years for works-for-hire).<sup>20</sup> This action spurred an academic and legal backlash from critics who felt that the extension needlessly impaired public access and failed to provide a corresponding societal benefit.<sup>21</sup> Relying on economic and psychological arguments, these critics maintain that the extension is too temporally distant to provide any significant additional incentive effect. To illustrate that the CTEA's effects

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<sup>20</sup> Pub. L. No. 105-298, §102(b), 112 Stat. 2827 (1998) (amending 17 U.S.C. § 302).

<sup>21</sup> In fact, "[t]he debate over how long a copyright should last is as old as the oldest copyright statute and will doubtless continue as long as there is a copyright law." H.R. REP. NO. 94-1476, at 133 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5749. See, e.g., R. R. BOWKER, COPYRIGHT: ITS LAW AND ITS LITERATURE 33 (1886) (calling for a term of life of author plus some years); Samuel J. Elder, *Duration of Copyright*, 14 YALE L.J. 417, 418 (1905) (same); Brander Matthews, *The Evolution of Copyright*, 5 POL. SCI. Q. 583, 584-85 (1890) (same); H. C. CAREY, LETTERS ON INTERNATIONAL COPYRIGHT (1868) (opposing extensions of copyright duration); Francis Lieber, *On International Copyright*, in a Letter to the Hon. William C. Preston (1840) (advocating for perpetual copyright).



are diminutive, scholars rely on theoretical incentive models that focus on individual authors' responses to increases in copyright duration.<sup>22</sup>

The CTEA attempts to increase copyright's value to creators by increasing its duration. According to this theory, authors should find the longer duration more valuable because it allows for a longer exploitation period. More time to monopolize exploitation of the work leads to a greater financial reward.<sup>23</sup> In turn, the promise of a greater reward ought to incentivize more creation. This model assumes that extending the term of protection further into the future will stimulate more new creation in the present. However, where humans are required to make judgments involving long periods of time, our method of valuation operates nonlinearly.<sup>24</sup> Longer protection does not necessarily mean that we perceive a higher value. Two psychological mechanisms prevent the average individual from accurately calculating the additional future earnings the CTEA attempts to offer: temporal discounting and a limited ability to project into the future.

#### A. *Temporal Discounting*

Scholars have cited the inherent human tendency to discount the future as one of the greatest flaws in the CTEA's construction.<sup>25</sup> Temporal discounting is a well-documented psychological phenomenon whereby we require relatively more for a promised future gain than what we are offered as a present gain to achieve the same level of present value.<sup>26</sup> Stated another way: "money now is preferable to money

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<sup>22</sup> Ammori, *supra* note 3, at 321-22 (examining an economic equation that proves the CTEA is ineffective as a financial incentive); Arlen W. Langvardt et al., *Unwise or Unconstitutional?: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit*, 5 MINN. INTELL. PROP. REV. 193, 248-52 (2004) (arguing that "the CTEA's prospective application has questionable creation-incentive value in terms of the actual economic and moral rewards it would give artists.").

<sup>23</sup> See S. REP. NO. 104-315 at 12 (1996) ("By extending the copyright term for an additional 20 years for all existing and future works, the bill allows American authors to benefit from these increased opportunities for commercial exploitation of their works.").

<sup>24</sup> See Geoffrey Heal, *Discounting: A Review of the Basic Economics*, 74 U. CHI. L. REV. 59, 68-71 (2007) (describing humans' nonlinear responses to changes in stimuli); see generally B. Kyu Kim, *Understanding Anticipatory Time Perception in Consumers' Time-Related Decisions*, (May 17, 2010) (unpublished Ph.D. dissertation, University of Pennsylvania) (illustrating common psychological mechanisms that result in inconsistent valuations for rewards depending on the temporal distance to the reward).

<sup>25</sup> See, e.g., Brief for Akerlof, et al. as Amicus Curiae Supporting Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-680), 2002 WL 1041846 at \*6 (arguing that the twenty-year extension resulted in a discounted-present-dollar value of mere pennies, which is too insignificant an amount to provide any effective economic incentive).

<sup>26</sup> This psychological heuristic is distinct from the economically rational discounting meth-

later.”<sup>27</sup> Like other behavioral heuristics that aid in decision-making, discounting may not result in behavior that is purely economically rational. Instead, the heuristic helps to explain why individuals sometimes prefer choices that are economically irrational.

Discounting helps individuals decide between multidimensional options, such as the choice between receiving a large reward at a later date or a small reward immediately,<sup>28</sup> and is thus a function of preference.<sup>29</sup> In terms of copyright, the preference in question is between a fifty-year term and a seventy-year term. Scholars use discounting concepts in an effort to determine whether the award available at seventy years is preferable to the award available at fifty years.<sup>30</sup> Granting copyright protection to a work indicates that a financial reward will be available in the future from licensing fees and other forms of revenue. The traditional theory of copyright as an incentive assumes that authors will consider the value of the future payoff when deciding whether to create or disseminate a work in the present. Extending the copyright term by twenty years increases the value of the future reward by increasing the amount of time the payments will continue.<sup>31</sup>

Though the entire copyright term may be considered the reward period for purposes of discounting, critics of the CTEA focus on calculating the value added by the additional twenty years. These scholars argue that the additional twenty years are so temporally distant that their

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od used in accounting. The main difference is that psychological discounting considers how authors subjectively perceive worth, whereas economic discounting attempts to determine mathematically accurate present values based on rates of interest. Individuals rely on psychological discounting to inform their preferences and aid in decision-making and do not necessarily see an objective economic difference between future and present values. Instead, they focus on the subjective value they perceive money to have at different points in time depending on personal needs and preferences. See, e.g., James C. Cater, *Corrections*, 130 PUB. UTILS. FORTNIGHTLY 16, 16-17 (Vol. 12, 1992) (explaining that “the consumer discount rate . . . is a function of the consumer’s preferences and tastes,” while “the utility discount rate . . . relies solely on the firm’s cost of money.”).

<sup>27</sup> Manel Baucells & Rakesh K. Sarin, *Evaluating Time Streams Of Income: Discounting What?*, 63 THEORY & DECISION 95, 118 (2007).

<sup>28</sup> Leonard Green & Joel Myerson, *A Discounting Framework for Choice With Delayed and Probabilistic Rewards*, 130 PSYCHOL. BULL. 769, 769 (2004).

<sup>29</sup> Leonard Green & Joel Myerson, *Exponential Versus Hyperbolic Discounting of Delayed Outcomes: Risk and Waiting Time*, 36 AM. ZOOLOGIST 496, 499 (1996) [hereinafter Green & Myerson, *Discounting Outcomes*].

<sup>30</sup> Ammori, *supra* note 3, at 321 (pointing out that the increased term would only incentivize authors who were not already incentivized under the life-plus-fifty year term and using discounting to conclude that the increased value would be too low to incentivize any author).

<sup>31</sup> Future rewards will of course be paid out to the author’s heirs because of the term’s life-time-plus-years construction.

value is nearly zero.<sup>32</sup> Due to discounting, an author in the present will calculate the value of a copyright between the fiftieth and seventieth years following death (that is, the twenty-year extension period) to be mere pennies. Scholars thus infer that the additional incentive gained by the twenty-year extension is too insignificant to encourage more creation.<sup>33</sup> This position implicates the concern for maintaining access to the public domain; the inherent assumption is that copyright ought not to offer more than is necessary to incentivize creation. Setting the reward at a very distant point in the future is thus unnecessary. The reward period need only extend to the point where it is still highly valued in the present in order to give authors a sufficient incentive to create. If it reaches the point where it becomes subject to substantial discounting, it becomes worthless and unduly encroaches upon the public domain.<sup>34</sup>

This understanding of discounting, originally identified by behavioral psychologists,<sup>35</sup> has been corroborated by focused empirical research on copyright incentives. Among other researchers, Avishalom Tor and Dotan Oliar have explored the discounting behaviors authors display and their effects on the incentive offered by the extensive copyright term. In their article *Incentives to Create Under a "Lifetime-Plus-Years" Copyright Duration: Lessons From a Behavioral Economic Analysis For Eldred v. Ashcroft*, Tor and Oliar hypothesize that real-world, "boundedly rational" authors (as opposed to economically rational actors) will value the CTEA's twenty-year copyright term extension insufficiently to gain any real incentive from it.<sup>36</sup>

To prove this hypothesis, they apply a theory of hyperbolic discounting.<sup>37</sup> Hyperbolic discounting refers to the use of lower discount rates for far-future rewards than for near-future rewards. This some-

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<sup>32</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 254-56 (2003) (Breyer, J., dissenting); Brief for Akerlof et al., *supra* note 25; Ammori, *supra* note 3, at 321; Langvardt et al., *supra* note 22.

<sup>33</sup> See Brief for Akerlof et al., *supra* note 25, at \*8.

<sup>34</sup> Langvardt et al., *supra* note 22, at 259-63.

<sup>35</sup> For a concise history of discounting scholarship, see Kim, *supra* note 24, at 1-6.

<sup>36</sup> Avishalom Tor & Dotan Oliar, *Incentives to Create Under a "Lifetime-Plus-Years" Copyright Duration: Lessons From a Behavioral Economic Analysis for Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 437, 440-43 (2002). Bounded rationality refers to the idea that human cognitive ability is limited, and thus we use mental shortcuts (or "heuristics") to assist with decision-making. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477-78 (1998).

<sup>37</sup> There are two possible mathematical forms that temporal discounting could take in individuals: exponential or hyperbolic. Green & Myerson, *Discounting Outcomes*, *supra* note 29, at 497. Researchers have found that the most common discounting behavior has a hyperbolic form. Klapproth, *supra* note 17, at 514.

what counterintuitive theory has two practical implications. First, actors will steeply discount events in the near future, while discounts for far-future events will be relatively low. Consequently, actors will value far-distant rewards closely to their present value.<sup>38</sup> For example, an author might grossly undervalue the worth of a short-term copyright (extending one to three years into the future) by applying a very steep discount rate and conclude that he would prefer to receive a lower award instantly rather than wait for a marginally higher award. However, the author would apply a much lower discount rate to a long-term copyright, causing him to estimate its future worth to be more significant and thus increasing the likelihood that he would prefer to wait for the reward instead of receiving a lower amount instantly. It is important to note that even a very low discount rate will yield a low present value—especially when extended over a significant period of time. For example, using a four percent discount rate, I would calculate that \$100 ten years from now is worth only \$71.41 to me today.<sup>39</sup>

Tor and Oliar first performed a focused empirical survey by asking authors to rate the attractiveness of varying “lifetime plus years” durations.<sup>40</sup> As they hypothesized, there was no significant difference between the attractiveness of “lifetime plus fifty” years and “lifetime plus seventy” years, indicating that authors do not consciously prefer longer periods of protection.<sup>41</sup> The authors then explicitly asked participants to rate the present value of dollars received by their heirs in the middle and distant future.<sup>42</sup> According to hyperbolic discounting, participants should have highly discounted the mid-distant value but applied a lower discount to the far-distant value. The findings were in line with the theory; participants valued every dollar received thirty to fifty years after death at fifty cents and every dollar received thirty to seventy years after death (representing the twenty-year extension) at eighty cents.<sup>43</sup> Authors used a very low discount rate for the far-distant rewards (only about four percent), resulting in valuations that were very close to actual present values. In spite of the low discount rate, the present values achieved were nevertheless insufficient to make the participants prefer

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<sup>38</sup> See Tor & Oliar, *supra* note 36, at 484, for an expanded explanation of hyperbolic discounting.

<sup>39</sup> Present-value calculations provided by <http://www.pine-grove.com/online-calculators/pv-calculator.htm> (calculated on Mar. 8, 2013).

<sup>40</sup> Tor & Oliar, *supra* note 36, at 488-89.

<sup>41</sup> *Id.* at 489.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

the fifty-year term over the seventy-year term.<sup>44</sup> In other words, internal discounting tendencies led the participants to conclude that the potential profits available from a twenty-year extension did not make the longer term more appealing than the shorter term.

### B. *Short-term Future Time Horizons*

One explanation for discounting is that individuals adapted the behavioral mechanism to help cope with risk.<sup>45</sup> There is an implicit risk in waiting for rewards because the probability of receiving a particular outcome decreases as the delay to achieving that outcome increases.<sup>46</sup> Individuals have a limited ability to imagine and project into the future; thus, we rely on heuristics like discounting to help make decisions about uncertain events. However, these heuristics can only go so far.

Individual time horizons among Western populations tend to hover between five and fifteen years.<sup>47</sup> People are hesitant to make plans and projections beyond this time period and may believe that they are unable to forecast accurately even their own futures due to rapid rates of technological and societal change.<sup>48</sup> Even when making a concerted effort to envision the future, we are psychologically incapable of forming detailed mental representations.<sup>49</sup> This may be in large part due to our expectations that substantial change is imminent.<sup>50</sup> With an impaired capacity to contemplate and visualize the future, it is unsurprising that devaluation of future rewards occurs. Particularly with respect to copyright, authors may have difficulty imagining how their present-day actions will concretely benefit any future heirs (assuming they

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<sup>44</sup> *Id.*

<sup>45</sup> Green & Myerson, *Discounting Outcomes*, *supra* note 29, at 496-97.

<sup>46</sup> *Id.* at 497.

<sup>47</sup> George Boniecki, *What are the Limits to Man's Time & Space Perspectives?: Toward a Definition of a Realistic Planning Horizon*, 17 *TECHNOLOGICAL FORECASTING & SOC. CHANGE* 161, 172 (1980); Senem Göç & M. Atilla Öner, *Operationalization of Space/Time Perspectives of Individuals—Theory and Empirical Results from Turkey*, 41 *FUTURES* 301, 310 (2009). The earlier study reported a longer average time horizon; however, it also suggested that temporal horizons are likely contracting as technological changes occur more rapidly. Boniecki, *supra*, at 168-69. Because periods of continuity are shrinking, change appears to be “just around the corner.” *Id.* In addition, fears about impending self-destruction either through nuclear warfare or resource scarcity contribute to a sense that there is no future, which also causes time perspectives to shrink. *Id.* at 171. Interestingly, the latter study, completed nearly thirty years after these predictions, found an average time horizon of just 4.8 years. Göç & Öner, *supra*, at 310.

<sup>48</sup> Boniecki, *supra* note 47, at 167-69.

<sup>49</sup> Klapproth, *supra* note 17, at 509.

<sup>50</sup> See Boniecki, *supra* note 47, at 169 (explaining that temporal horizons contract as uncertainty about the future increases due to a belief that change is “just around the corner.”).

think about this at all and are not merely concerned with profiting during their lifetimes). Authors could theoretically disregard the very low present value of the extended copyright term and acknowledge that some future reward exists. However, because of the difficulty of imagining the future, the copyright's potential future import will be too diminished to affect the incentive to create.

Tor and Oliar's research represents a small portion of the material protesting the ever-extending copyright term duration. The outcry is well-founded and backed by substantial psychological and economic data. By these accounts, extending the copyright term does not appear to increase the incentive for individual authors to create, but does stymie the use of materials for enjoyment or creation of derivative works by others. However, this criticism of the copyright term as an incentive relies on arguments about how individuals perceive the future. It does not take into account the numerous other actors within the copyright industry, such as corporate authors and copyright firms. Until the roles of these additional parties are thoroughly analyzed, scholars should refrain from categorically rejecting the copyright term extension as an incentive.

### III. A THEORETICAL PRODUCTION-CENTRIC INCENTIVE MODEL

The critique of incentives put forth by the CTEA's opponents is incomplete. It fails to give credence to the role that intermediary producers, such as movie studios and publishers, could play in the creation process.<sup>51</sup> If producers are more responsive than individuals to direct financial incentives, they might be able to serve as intermediaries by passing the incentive on to individual authors. The presence of an incentive intermediary could circumvent the individual's discounting problem, resulting in increased incentives for all creators. Even if firms are not actually intermediaries, they might still be more responsive to financial incentives than individuals, which may result in production increases that are sufficient to consider the copyright term expansion a successful incentive.<sup>52</sup> Because of these oversights, the ar-

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<sup>51</sup> Tor & Oliar recognize that authors with different life expectancies might respond differently to lifetime-plus-years copyright terms; they focus on differences between individuals (such as female authors versus male authors) and do not fully develop this analysis to include the unique features of copyright firms. See Tor & Oliar, *supra* note 36, at 450-55.

<sup>52</sup> What we consider to be a "successful" incentive depends in part on the way society values production increases versus potential harms that the copyright expansion may cause. Such harms may include the reduction of the public domain, discussed *supra* in Part I, or a suppression of creation by authors who are not motivated by financial incentives, discussed *supra* at

argument that the CTEA's incentive effect is insignificant is vulnerable to criticism.

In this Part, I propose one theoretical model that could support the theory that financial incentives are more effective at increasing firm production than individual creation. This proposal is not intended to encompass the full spectrum of firm behaviors; instead, my analysis focuses on commonly criticized features of individual responses to incentives—especially discounting—to determine whether these drawbacks could be avoided in the firm context. I use this model to illustrate what I call the incentive intermediary effect; that is, the ability for copyright firms, if they are responsive to financial incentives, to pass these incentives along to less responsive individual authors. I then assess the ways that the proposed model differs from actual firm behavior and address other objections that might be levied against the model. In Part IV, I will describe the evidence that would be necessary to support this theory and analyze some potentially suggestive existing research.

#### *A. A Theoretical Model of Production-Level Incentives*

A copyright in and of itself does not have economic value to a creator. The copyright's worth depends on the amount for which the creator can sell or otherwise exploit the work. The incentive model discussed in Part II contemplates the reward an individual author receives from exploiting his work. In some instances, authors may be able to sell their works directly to end users—for example, an author who publishes his book and enjoys returns for the remainder of his life plus seventy years. This uncomplicated scenario is what many people imagine when discussing the idea of incentives for authors. It is easy to understand how an author might underestimate the far-future financial return of a copyright because of the enormous amount of time between the decision to create and receipt of that reward by the author's heirs.<sup>53</sup>

However, this simplistic picture does not reflect the reality of frequently complex copyright transfers. Though some individual authors may exploit their works directly, an entire industry has grown out of buying, selling, producing, reconstructing, and distributing the works created by individuals. In this copyright industry, authors may have only tenuous connections to the final products that result from their

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note 19 and in accompanying text. Note that both of these harms are speculative because it is impossible to quantitatively establish how much creation does not occur; whereas production increases can be measured and are thus easier to guarantee.

<sup>53</sup> See *supra* Part II.

original creations. As a basic example, consider this much-simplified chain of events contributing to a Hollywood movie production. A writer composes a screenplay, which his agent sells (along with its full copyright), for a lump sum, to a small movie studio. That purchaser finds a studio to finance production and distribute the resulting audio-visual work as a finished film.<sup>54</sup> Ultimately, the interest in the writer's original copyright will rest with various investors along the production chain rather than with the original author.<sup>55</sup> Producers invest in the screenplay and resulting film based on projections about how much value they will be able to extract from it.<sup>56</sup> Some of the parties involved, especially the distributors, have a relatively strong interest in future exploitation possibilities.<sup>57</sup> They may invest more money and thus take on a greater risk, so the availability of long-term exploitation becomes more important. More time to exploit a work exclusively gives the investor a longer period of time over which to recoup costs and realize a profit.<sup>58</sup> On the other hand, other parties along this chain, such as the agent, will be satisfied with merely receiving a cut of the screenplay's original sale price.<sup>59</sup>

Each player along the production line will value the screenplay copyright depending on his ability to exploit it. The author might inadvertently engage in discounting, resulting in a low estimation of the

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<sup>54</sup> This scenario illustrates the process for spec sales, wherein the author composes a work and later tries to sell it. It is distinct from the more common process of assignment, wherein a studio pays an author in advance to write a specific screenplay. The spec sale process approximates the traditional theoretical understanding of the copyright incentive system. For explanations of these and other common entertainment industry terms, see *Words and Terms You Need to Know*, HOLLYWOODLITSALES.COM (Aug. 15, 2005), <http://www.hollywoodlitsales.com/cf/journal/dspJournal.cfm?intID=3066>.

<sup>55</sup> There is an exception to this general proposition. Authors retain an inalienable termination right, which they can exercise to regain full control of the original copyright thirty-five years after transferring it. See 17 U.S.C. § 203. This right, and its impact on the model illustrated here, is discussed in detail in Part V, *infra*.

<sup>56</sup> See S. Mark Young et al., *The Business of Making Movies*, STRATEGIC FIN., Feb. 2008, at 26, 30 (outlining the process for green-lighting production based on projected profitability).

<sup>57</sup> 1 ROBERT LIND ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 1:17 (3d ed. 2012) (Westlaw) (explaining various exploitation opportunities available to distributors and asserting that “[d]istribution is the most lucrative sector of the motion picture branch.”).

<sup>58</sup> For example, studios may enjoy multiple revenue streams from exploiting various distribution technologies and products, such as creating video games based on a film or licensing the film to different types of consumers. *Id.* These revenue streams will become available at different times depending on industry practice and technological advances. *Id.*

<sup>59</sup> See *FAQ*, ASS'N OF TALENT AGENTS, <http://www.agentassociation.com/frontdoor/faq.cfm?fQtype=Agent> (last visited Mar. 8, 2013) (explaining that industry practice is for talent agents to receive a commission based on the sale price of the artist's work).



copyright's future exploitation value. However, studios might be able to recognize more long-term opportunities for exploitation than those that an individual author can readily imagine. In particular, if the film based on the screenplay becomes a classic, the studio will be able to take advantage of new technologies and distribution platforms for decades to come. Taking this potential long-term revenue flow into consideration might result in a higher valuation of the copyright by the studio. In this case, even if firms were to engage in discounting, low present values may not necessarily limit the appeal of future rewards.

Firms often have long-term future planning horizons, a quality that would enable copyright firms to consider future opportunities for exploitation and thereby designate a higher valuation to the copyright. For decades, business theory has encouraged firms to form long-range strategic plans.<sup>60</sup> In order to determine the appropriate planning horizon, firms look to traditional criteria. Three principles are especially relevant to copyright firms: (1) the present value, discounted for depreciation; (2) the product life cycle; and (3) the anticipated investment recovery period.<sup>61</sup>

Firms may use discounting as an accounting mechanism that is distinct from an inadvertent psychological behavior to calculate the depreciation of assets. As a result, copyrights' present values will be depressed on company balance sheets. Management scholars recommend that planning horizons for discounting extend only to the point that present value expectations are practically zero.<sup>62</sup> Though this strategy alone could result in values that are discounted to the same extent as those used by individuals,<sup>63</sup> corporations have additional considerations to take into account.

Planning horizons based on product lifecycle will reflect the entire expected term of commercial viability for the firm's assets. Compared

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<sup>60</sup> See, e.g., Roger H. Bezdek, *The State of the Art—Long Range Economic and Manpower Forecasting*, 8 LONG RANGE PLANNING 31 (Issue 1, 1975); Yoram Friedman & Eli Segev, *Horizons For Strategic Planning*, 9 LONG RANGE PLANNING 84 (Issue 5, 1976). "Long-range" typically refers to the period of time between three and ten years into the future, but may extend longer. See Bezdek, *supra*, at 31.

<sup>61</sup> See Friedman & Segev, *supra* note 60, at 87 (discussing a number of existing approaches for determining optimal time horizon).

<sup>62</sup> *Id.*

<sup>63</sup> It would be useful to look at the financial statements of entertainment firms to find out whether they use a fixed discount rate or a rate that reflects the demand curve for a typical film (high popularity at first release decreasing slowly for the first ten years, then dropping off exponentially for the duration of the copyright life). A fixed discount rate might actually result in lower discounting than that engaged in by individuals (although there is no way to know the exact psychological discount rate that will apply to any given future reward as discount rates vary among individuals).

to other consumer products, copyright products (especially those with high popularity) are particularly long-lived in that they are capable of capturing attention and audiences for decades after their initial distribution.<sup>64</sup> Consequently, a copyright firm's time horizon may extend further than time horizons for firms in other industries, and much further than an individual's short-term future horizon.

Finally, copyright firms have an exceptionally long investment recovery period because of the duration of copyright protection. The long duration of protection allows for long-term exclusive exploitation of a work, during which firms can recoup their investments. The simple nature of the copyright industry might also contribute to long time horizons—over the course of the firm's life, the goal remains virtually the same (to produce movies, books, music, or other art), and only the means for creation change as new technologies emerge. This gives firms a perspective on the future that is comparatively stable relative to the vast range of personal, professional, and societal changes individuals anticipate when imagining their futures. Accordingly, it is likely somewhat easier for firms to visualize and plan for longer future terms.

Altogether, the unique features of copyright naturally enhance the likelihood and ability of firms in the industry to have very long future planning horizons. Moreover, use of traditional techniques to determine time horizons places increased importance on the long-term exploitation value of copyrights, which helps to prevent accidental or unwarranted minimization of the exploitation value.

Firms may also be more receptive to the promise of far-future rewards simply because their financial structures are more forgiving than an individual's. Individual authors may necessarily be focused on receiving immediate returns merely for survival. The need to provide food and shelter for one's family in the present may outweigh the desire to create. If this factor limits creation under a lifetime-plus-fifty year regime, then offering an increased reward that will not materialize until the fiftieth year post-death will do little to incentivize those indi-

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<sup>64</sup> Stan J. Liebowitz & Stephen Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects*, 18 HARV. J. L. & TECH. 435, 455 (2005) (showing that forty-one percent of all books remained in print fifty-eight years after their initial publication, while fifty-four percent of best-sellers remained in print after fifty-eight years). See also *Eldred v. Ashcroft*, 537 U.S. 186, 248 (2003) (Breyer, J., dissenting) (“[A]bout 2% of copyrights between 55 and 75 years old retain commercial value . . . [these works] still earn about \$400 million per year in royalties.”); EDWARD RAPPAPORT, CONG. RESEARCH SERV., 98-144 E, COPYRIGHT TERM EXTENSION: ESTIMATING THE ECONOMIC VALUES (1998) (estimating that most authors probably anticipate five to ten years of “healthy sales” and reviewing the long-term commercial viability of copyrighted works).

viduals who choose to work in jobs with immediate returns rather than engaging in creation. Subjectively, the value of uncertain rewards is lower when a guaranteed income is necessary, so individuals may have little preference for the future returns over rewards available immediately. Firms, which are more likely to have an external source of capital (for example, equity shareholders or favorable bank loan options) and the expertise to anticipate future returns, are often more willing to engage in risky investments than individuals. Being less risk-averse, and thus more comfortable with uncertain future returns, the firm's subjective value of the future reward may be higher even when rational discounting is used to assess the economic value of the investment. Because all future revenue may be included in planning to recoup investments when firms are focused on the long-term, even highly discounted future returns may be sufficient to influence studios to engage in creation.

A critique of incentives that relies heavily on an author's tendency to undervalue the work is flawed because it fails to recognize the ability of other parties, such as copyright firms, to value the work accurately. Returning to the film example, consider that studios use methods ranging from conventional wisdom to complex algorithms in an effort to predict their projects' future profitability.<sup>65</sup> This is because film executives believe they can accurately identify future blockbusters, despite evidence that film popularity is highly random and that the likelihood of any given film becoming a success is low.<sup>66</sup> Studios will be more likely to expend resources on those screenplays that their managers perceive as having a high market value (even if this initial valuation turns out to be wrong). Moreover, the studio business model requires that they be able to recoup investments by making successful films. Much of the actual revenue from even high-grossing films comes from ancillary sources such as television and overseas licensing, merchan-

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<sup>65</sup> See, e.g., Marco Cucco, *The Promise is Great: The Blockbuster and the Hollywood Economy*, 31 MEDIA, CULTURE & SOC'Y 215, 221-28 (2009) (outlining some qualitative strategies studios use to predict and maximize their box office profits); Scott Schlesinger, *Using Analytics to Predict Hollywood Blockbusters*, HBR BLOG NETWORK (Oct. 11, 2012, 10:00 AM), [http://blogs.hbr.org/cs/2012/10/using\\_analytics\\_to\\_predict\\_hollywood\\_blockbusters.html](http://blogs.hbr.org/cs/2012/10/using_analytics_to_predict_hollywood_blockbusters.html) (advocating for an increased use of technological tools in forecasting blockbuster successes). Despite widespread adherence to such methods, we know that success in Hollywood is almost impossible to predict. Arthur De Vany & W. David Walls, *Uncertainty in the Movie Industry: Does Star Power Reduce the Terror of the Box Office?*, 23 J. CULTURAL ECON. 285, 286 (1999) ("Revenue forecasts have zero precision, which is just a formal way of saying that 'anything can happen.'").

<sup>66</sup> *Id.* at 313-15.

dising, and amusement park rides.<sup>67</sup> Copyright protection is very important to the investment-recoupment business model because the copyright term gives studios an extended period of time over which to create these ancillary marketing opportunities and thereby recoup costs. Thus, it would be sensible for a studio to take long-term exploitation opportunities into account when it calculates the value of the screenplay's copyright. Given the greater opportunity for exploitation, the studio should place a higher value on the post-CTEA copyright term (the author's life plus seventy years) than a copyright of shorter duration (such as the prior term of the author's life plus fifty years). Theoretically, the studio should pay more for a screenplay with the valuable long-term copyright because of the long-term exploitation opportunity it represents.<sup>68</sup>

If the studio were capable of accounting for the increased value of a longer copyright term, and actually paid more for a script because of its long-term value, the author's compensation would reflect the higher valuation. Because of the studio's ability to forecast the accurate future value, the price the author would receive for the script would not be reduced to insignificance by discounting. Even though the author may independently engage in discounting and underestimate the value of the copyright, the studio's valuation would override the author's inherent discounting heuristic. This would prevent the script's long-term capacity for exploitation from being undervalued. More important for the purposes of this incentive model, it would also ensure that the author receives the full financial incentive attributable to the longer copyright term. Though an author left to his own devices may substantially discount the worth of a copyright and thus reduce the tangible incentive, intermediaries<sup>69</sup> at higher levels along the production chain, like film studios, may not be subject to the same discounting tendencies. These intermediaries can intervene with the author's natural discounting heuristics by providing a market price that is higher than an author's individual calculation and is thus a greater financial incentive.

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<sup>67</sup> Adam Davidson, *How Does the Film Industry Actually Make Money?* N.Y. TIMES (Jun. 26, 2012), [http://www.nytimes.com/2012/07/01/magazine/how-does-the-film-industry-actually-make-money.html?\\_r=0](http://www.nytimes.com/2012/07/01/magazine/how-does-the-film-industry-actually-make-money.html?_r=0).

<sup>68</sup> Whether studios actually behave this way is a separate practical issue. See *infra* Part III.B.

<sup>69</sup> In the copyright context, the term "intermediary" is often used to refer to intermediary communicators, such as service providers who transmit information from creators to users. See Thomas F. Cotter, *Some Observations on the Law & Economics of Intermediaries*, 2006 MICH. ST. L. REV. 67, 68 (2006). I use "intermediary" to refer to producers of creative content who transmit the incentive effect to the authors of such content.

Even if producers do not pay more for longer copyrights, they may still pass on indirect incentives to authors.<sup>70</sup> The CTEA had an additional effect beyond increasing the duration of future copyrights—it also increased the duration of *existing* copyrights by twenty years. Copyright firms’ most valuable assets are their libraries of copyrighted works. The grant of an additional twenty years in which to exploit existing works increased the value of these copyright libraries.<sup>71</sup> With existing materials worth more, firms could incorporate these additional returns into equity calculations and thus increase their production output. Returning to the film production example, increasing output would result in additional opportunities for authors to sell their screenplays. Other examples may include increased creative opportunities for other artists within the film industry, such as directors and cinematographers. Moving beyond the film industry, there might also be increased opportunities for other authors to sell rights in their manuscripts to publishing houses. Additional opportunities to sell one’s work are not exactly the same as an increased financial reward for creating a work; however, it seems that the distinction would make little difference. Both systems enhance the appeal of creating and thus act as incentives for authors, even though the direct effect takes place at the firm level.<sup>72</sup>

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<sup>70</sup> A producer may not be willing to pay more, either because of doubts that the work will continue to bring in revenue for a long time or because of concerns that the author will exercise the termination right after thirty-five years. These considerations will be addressed further in Part III.B.

<sup>71</sup> Some studios went through their libraries at the time of the CTEA and found only marginal increases in the films’ values (aside from titles that had become classics or cult favorites). Interview with David R. Ginsburg, Executive Director, Entertainment, Media, and Intellectual Property Law Program, UCLA School of Law, in L.A., Cal. (Feb. 8, 2012). Nevertheless, some research suggests that even this slight increase in value may have been sufficient to prompt an increase in production. See Matthew J. Baker & Brendan M. Cunningham, *Court Decisions and Equity Markets: Estimating the Value of Copyright Protection*, 49 J. L. & ECON. 567, 593 (2006). In addition, a CRS report prior to the enactment of the CTEA found that although only a small number of copyrights retained their commercial viability after fifty-five years, the revenue generated by those copyrights was substantial. See *Eldred v. Ashcroft*, 537 U.S. 186, 248-49 (2003) (Breyer, J., dissenting) (commenting on the \$400 million annual royalty “reward” generated by copyrights that retained their commercial viability after fifty-five years).

<sup>72</sup> In fact, because it is not a direct financial award, offering additional opportunities to sell work might even help to incentivize those authors who would be deterred by greater payoffs. See Amabile, *supra* note 19; see also Fromer, *supra* note 2, at 1765-71 (discussing authors’ moral interests in disseminating their works, enhancing their reputations, and controlling use of their works as expressive, rather than financial, incentives).

B. *Objections and Limitations to the Producer Incentive Model*

The incentive model illustrated in the preceding subpart is limited and thus open to a number of criticisms. An immediate problem with this model is the fact that firms do not necessarily have longer time horizons than individuals. Firms consist of individuals and these individuals make organizational decisions.<sup>73</sup> Accordingly, firm decisions may be influenced by the same behavioral heuristics that affect individuals. There is some evidence to support this assertion.<sup>74</sup>

However, the distinction between firms and individuals may be less important than the distinction between copyright creators and copyright owners. In the copyright literature, owners and creators are often treated interchangeably.<sup>75</sup> This conflation may be useful in some contexts, but is important to distinguish when considering the comparative interests each has in a given copyright. While creators may be concerned with providing for their descendants, they are immediately concerned with paying rent and feeding themselves—thus, their interest in the copyright is predominated by its present worth. If the present value of the copyright term is low, duration extensions will not increase the incentive to create because they will not improve the creator's short-term ability to obtain a high value for the work. In contrast, copyright owners—meaning those whose interest is in long-term exploitation of the copyright—may occasionally seek to sell their copyrights for profit, but are generally more concerned with the long-term value of exploitation. Lengthening the copyright term—and thus extending the period available to the owner for exclusive, profitable exploitation—will increase the owner's valuation of the copyright. The difference in interest between creator and owner results in different responses to the copyright term extension; an owner's incentive to invest in a longer-term copyright is greater than an author's incentive to create a work that will have a longer copyright term.

Another obvious problem is the model's reliance on an example that illustrates only a small subset of film production, which is unlikely

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<sup>73</sup> See, e.g., JOSEPH L. BOWER, *MANAGING THE RESOURCE ALLOCATION PROCESS: A STUDY OF CORPORATE PLANNING AND INVESTMENT* 8-11 (2d ed. 1986) (describing how individuals within a complex corporation are responsible for creating capital-spending programs).

<sup>74</sup> Cf. Göl & Öner, *supra* note 47, at 311 (recommending that managers with distant future perspectives be assigned to long-term planning decisions, while managers with shorter future orientations work on projects requiring short-term planning).

<sup>75</sup> See, e.g., Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 *HASTINGS L.J.* 433, 436 n.11 (2007) (acknowledging that although creators are often distinct from owners the term "creators" was intended to include both groups).

to be representative of the entire copyright industry. For purposes of illustrating how the model might help to transfer incentives in a perfectly linear and uncomplicated system, the author-sells-screenplay-to-studio scenario is convenient. Unfortunately, reality is neither linear nor uncomplicated. The number of films that result from purchasing an externally-produced screenplay is negligible.<sup>76</sup> It is much more common for studios to contract for screenplays as works-for-hire than to purchase a completed screenplay from an independent author.<sup>77</sup> Other examples from within the copyright industry might fit this linear model more realistically; for example, it is common for a publishing house to purchase rights in an already-completed manuscript rather than hire authors *ex ante* to write books.<sup>78</sup> With respect to other forms of creation, however, the idea of intermediary producers may not be applicable at all. Sculptors, painters, and other visual artists typically market and sell their work directly to end users such as collectors or museums, or produce their art as works-for-hire.<sup>79</sup>

Works that are produced as works-for-hire are also excluded from the producer-incentive model, which is a weakness of the model's focus on a screenwriter-producer relationship. The prevalence of work-for-hire in all areas of the copyright industry diminishes the practicality of a model that wholly ignores that type of work. I have chosen to exclude works-for-hire from this discussion because it is unclear which incentive model they fall into. In a work-for-hire situation, the creation is a direct response to the financial incentive granted by the commis-

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<sup>76</sup> There were a total of 132 spec screenplays sold in 2011, a dramatic increase over the 62 sales in 2010. *2011 Year End Spec Market Scorecard*, THE SCOGGINS REPORT (Jan. 13, 2012), <http://scogginsreport.com/2012/01/scoggins-report-2011-year-end-spec-market-scorecard/>.

<sup>77</sup> What I refer to as "work-for-hire" screenplays are called "writing assignments" in industry terminology. Such assignments require authors to take existing ideas or screenplays and develop them further. Writers are paid up-front for their labor instead of creating original work based on the expectation of a future sale. Such writing assignments represent the majority of profitable writing work in Hollywood; one full-time writer estimates that assignment work "dwarfs spec sales by about 1,000 to one." John Buchanan, "Landing Your First Assignment," *SCRIPT MAGAZINE* (Dec. 23, 2011, 9:51 AM), <http://www.scriptmag.com/features/landing-your-first-assignment>.

<sup>78</sup> LIND ET AL., *supra* note 57, at § 1:79 ("Traditionally, a literary work begins with a proposal for or submission of a literary work."). In this traditional model, authors typically assign their copyrights to the publisher and may receive royalties for copies sold. *Id.* at n.4.

<sup>79</sup> See, e.g., Alan Bamberger, *Making the Most of Art Gallery Shows and Exhibits: Understanding and Working with Gallery Owners*, ARTBUSINESS.COM (last visited Mar. 8, 2013), <http://www.artbusiness.com/osantvt.html> (encouraging artists to maximize their exposure to potential buyers through gallery shows); *15 Ways to Sell Your Art Online*, THEABUNDANTARTIST (last visited Mar. 8, 2013), <http://theabundantartist.com/15-ways-to-sell-your-art-online/> (surveying a number of direct artist-to-consumer retail outlets available online).

sioning party. On one hand, this method of creating could represent the proposed producer-incentive model at work. The commission could be seen as an incentive transfer from a producer (i.e., the commissioner) to an individual author (i.e., the artist). Alternately, the work-for-hire system could serve the artist-incentive model by demonstrating one way that copyright directly incentivizes creation. In this construction, the commissioner would be considered a stand-in for the actual artist, and the artist merely an instrument. The commissioner's decision to commission would be tantamount to an artist's decision to create, each incentivized by the availability of copyright protection for the resulting work. Both of these models assume that copyright provides an incentive to commission as well as an incentive to create, which may or may not be accurate.<sup>80</sup> Because of the numerous uncertainties about how works-for-hire relate to incentives to create, it is ignored in the models presented here.

The model is somewhat unrealistic for other reasons as well. Not only is it inapplicable to a large percentage of creative works because of its heavy reliance on the screenwriter-producer example, it also seems somewhat questionable even in the context of that limited scenario. In particular, the producer-incentive model assumes that intermediaries, recognizing that copyrights are more valuable after the twenty-year extension, will pass on the higher value to the artist. This assumption is problematic because there is no evidence that intermediaries actually would pass on the value. If authors are incapable of calculating the higher value, they might not recognize that they can demand a higher price for their works. Studios are unlikely to offer higher prices if they can obtain the more valuable copyright for the same cost as a shorter-term, less valuable copyright.<sup>81</sup>

One response to this critique is that even if authors do not recognize that they could receive higher prices, their agents—who are typically more legally sophisticated—should recognize this opportunity and ask for the higher prices.<sup>82</sup> Agents might have a duty to their cli-

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<sup>80</sup> See generally Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 9-12 (2008) (proposing that differently-motivated types of creation ought to receive different levels of protection and suggesting that some work-for-hire creation, such as wedding photographs or commercial advertisements, is motivated by its utility to the commissioner rather than its subjective value to the creator).

<sup>81</sup> Tor & Oliar, *supra* note 36, at 452 n.50.

<sup>82</sup> Though a legal degree is not required to become a talent agent, agents spend time negotiating business deals and drafting contracts for their clients and, as such, ought to be more attuned to legal opportunities than the laypeople they represent. See *Business Managers and*



ents to watch for relevant legal changes that could increase their clients' profitability, but there is no evidence that agents actually did attempt to ask for more money following the enactment of the CTEA.<sup>83</sup>

Furthermore, irrespective of who might recognize that authors could receive higher prices for works with longer copyright terms, studios may not readily agree to the higher prices. Studios may be reluctant to concede that the longer copyright actually has a greater value. For most films, the revenue flow peaks around the time the film is released in theaters and again when the film is released for home viewing (on DVD, online, or via pay-TV).<sup>84</sup> The income gradually tapers off over the course of five to ten years.<sup>85</sup> Following this period of peak popularity, the only significant future revenue flows will come from releases on new technological platforms.<sup>86</sup> Only a few films, which become classics or cult favorites, will continue to have lucrative long-term opportunities for exploitation through merchandising or licensing. In the aggregate, a large library of copyrighted works may earn substantial revenue in the long-term due to the success of a few titles.<sup>87</sup> Copyright firms could place a higher premium on longer copyright terms because of the potential for some works to earn high long-term

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*Talent Agent Job Description and Career Outlook*, U.S. NEWS UNIV. DIRECTORY (last visited Mar. 8, 2013), [http://www.usnewsuniversitydirectory.com/articles/agents-and-business-managers-of-Artists-performers-and-athletes\\_10669.aspx#.UOyNI2\\_BGh0](http://www.usnewsuniversitydirectory.com/articles/agents-and-business-managers-of-Artists-performers-and-athletes_10669.aspx#.UOyNI2_BGh0).

<sup>83</sup> There is only some tenuous documentation supporting this assertion, but, coupled with private anecdotes from industry insiders, I find the evidence convincing. I found there to be no noticeable increase in minimum prices negotiated for Writers Guild of America members in the years following the CTEA. An industry source confirmed that agents most likely did not ask for the additional money simply because studios would not have been receptive to the request. The source conceded that, if an agent did ask, a studio might be willing to pay the increased value in the years when the increase would matter—that is, they would design a deal wherein proceeds from the additional twenty-year period would be paid during the twenty-year period (between years fifty and seventy post-death). So, even if agents asked and studios agreed to pay a higher amount, the baseline price of the contract would still not reflect the increase, and authors would not see immediate benefits from the longer copyright term. Interview with David R. Ginsburg, *supra* note 71.

<sup>84</sup> LIND ET AL., *supra* note 57, at § 1:17 (“The first exploitation window is the motion picture’s initial theatrical release . . . . The most profitable window is the home video release that occurs four to six months after the initial theatrical release.”).

<sup>85</sup> See S. Mark Young et al., *The Business of Making Money With Movies*, STRATEGIC FIN., Feb. 2010, at 35, 36 t.1 (giving estimated time frames for a film’s commercial lifespan throughout different distribution channels).

<sup>86</sup> *Id.* at 38-40.

<sup>87</sup> See Dorothy Pomerantz, *Disney’s Success and the Death of Mid-Budget Movies*, FORBES (Aug. 28, 2012, 1:05 PM), <http://www.forbes.com/sites/dorothypomerantz/2012/08/28/disneys-success-and-the-death-of-mid-budget-movies/> (discussing the importance of large-budget movies and their ancillary revenue streams to sustaining studio growth); see also De Vany & Walls, *supra* note 65, at 286 (arguing that a very small number of extremely lucrative films are solely responsible for high box-office returns).

revenue; however, one can assume that any given screenplay has low long-term returns because of the low likelihood of attaining classic or cult status.<sup>88</sup>

Consequently, studio representatives may not be willing to pay more for a single screenplay merely because the author asserts that the copyright is available for a longer period of time. Instead, if they offer any additional compensation, it may be in the form of royalties based on any revenue earned during the extended copyright term.<sup>89</sup> Because the negotiation takes place between two individuals, both the author and the studio representative will rely on their discounting heuristic and psychologically minimize the screenplay's potential future earnings. Even though a copyright firm with a library of titles may, in the aggregate, earn substantial revenue from the additional twenty years of protection, an individual member of the firm who is only considering the additional revenue from one title will be subject to the same discounting heuristics as any other individual. Thus, the intermediary producer may not pass along any increased valuation of the copyright and the author may not receive any increased incentive.

Another reason that studios might be reluctant to agree to higher prices is because all contracting for spec screenplays takes place in the shadow of the author's inalienable termination right.<sup>90</sup> Termination enables authors to reclaim their full rights in a copyrighted work thirty-five years after transfer.<sup>91</sup> In effect, the studio will lose its interest in the underlying work (such as the screenplay) at thirty-five years, regardless of how long the copyright continues to exist.<sup>92</sup> Recall that highly popular works, such as classics, are the only works that continue to earn significant revenue long after release. These works might conceivably merit additional compensation because of the additional exploitation opportunities allowed by the extended copyright term. Giv-

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<sup>88</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 248 (2003) (Breyer, J., dissenting) (“[A]bout 2% of copyrights between 55 and 75 years old retain commercial value.”).

<sup>89</sup> Interview with David R. Ginsburg, *supra* note 71.

<sup>90</sup> Studios will go to great lengths to attempt to waive the termination right. Michael H. Davis, *The Screenwriter's Indestructible Right to Terminate Her Assignment of Copyright: Once a Story is "Pitched," a Studio can Never Obtain all Copyrights in the Story*, 18 *CARDOZO ARTS & ENT. L.J.* 93, 121-22 (2000). Despite efforts to the contrary, it is fairly clear that the right cannot be contracted around. *Id.* at 123. See also *Stewart v. Abend*, 495 U.S. 207, 230 (1990) (characterizing the termination right as “inalienable”).

<sup>91</sup> See Pub. L. No. 94-553, 90 Stat. 2541, 2569, 2572 (codified as amended at 17 U.S.C. §§ 203, 304 (2006)).

<sup>92</sup> Note that studios will not lose their interest in already-created derivative works such as films or toys based on the original work. 17 U.S.C. § 203(b)(1).

en that the termination right did not take effect until Jan. 1, 2013, the degree to which authors will take advantage of it largely remains to be seen. However, authors of high-earning works have a strong incentive to exercise their termination rights.<sup>93</sup> By terminating the original transfer, an author can renegotiate for more beneficial terms that reflect the work's popularity and proven earning power.<sup>94</sup> If studios expect that their most valuable copyrights will be terminated at thirty-five years, they will be disinclined to offer authors higher prices merely because the post-CTEA copyrights last longer. Without offering a higher price up front, the intermediary will not circumvent the author's inherent discounting heuristic, and thus the author will not respond as though the incentive has increased.

Any or all of these flaws may be fatal to the proposed model. If firms have strong reasons not to offer authors higher prices, such as the fear of termination, they will not act as intermediaries. Thus, even if firms do respond more positively than individuals to financial incentives from the increased copyright term, these additional incentives will not transfer to individuals.

#### IV. EMPIRICAL SUPPORT FOR THE PRODUCER-INCENTIVE MODEL

Despite the limitations and practical concerns to the proposed model, there is evidentiary support for the idea that intermediary producers respond differently than individuals to copyright term extensions. Moreover, although firms may not be inclined to channel increased financial incentives directly to individuals, research suggests that there are still ways the increased copyright term might enable firms to offer indirect incentives to authors.

A small body of empirical scholarship examines fluctuations in production following judicial and legislative decisions that expand copyright's scope. Research focusing specifically on levels of creative output attributable to copyright protection is somewhat limited by the difficulty of obtaining such statistics. As a result, the available research is fragmented and often contradictory, so it is not entirely conclusive. Nevertheless, the findings thus far are provocative. This Part briefly summarizes findings from the few empirical studies in this

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<sup>93</sup> For example, the family of Jack Kirby, creator of several popular Marvel characters, has already indicated its intent to terminate and recapture the copyrights in those characters. Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329, 1331 (2010).

<sup>94</sup> See *id.* at 1344-46 (discussing judicial interpretations finding that Congress intended the 1976 Copyright Act to protect authors from initial underestimations of a work's commercial value and longevity).

field.

A. *Baker & Cunningham: Court Decisions and Equity Markets*<sup>95</sup>

Seeking to address the discounting issue, Matthew Baker and Brendan Cunningham studied the effect of judicial and statutory expansions to copyright's breadth on copyright firms' equity.<sup>96</sup> Using firm equity values, or the value of the firms' stock to shareholders, they were able to trace the way the market valued copyright expansions. As predicted, they found that increases to the scope of copyright protection were significantly associated with increased profits for firms in copyright industries. For example, statutes broadening copyright increased the equity value of a typical firm by anywhere from seven million dollars to thirty-nine million dollars.<sup>97</sup> Landmark statutes, including the CTEA, tended to increase equity by approximately three times as much as relatively less important statutes.<sup>98</sup> The market's high valuation of the term extension suggests that markets may not be subject to discounting, or at least that discounting by markets is less detrimental to the long-term value of the copyright than that used by individuals and firms. The reasons for and implications of this effect will be discussed in Part V.

B. *Shih Ray Ku, et al.: Does Copyright Law Promote Creativity?*<sup>99</sup>

The study by Baker and Cunningham is useful in showing that the CTEA helped increase copyright firms' equity, but it does not establish whether increases to firm equity actually result in increases to production that can serve to incentivize new creation. Alternatively, the increased equity may merely be a windfall for the firms. To date, there have only been two notable attempts to discern whether the CTEA actually influences levels of production. One of these empirical studies is contained in a 2009 paper by Raymond Shih Ray Ku, Jiayang Sun, and Yiyang Fan.

Using the number of copyright registrations as a proxy for the

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<sup>95</sup> Baker & Cunningham, *supra* note 71.

<sup>96</sup> The authors surveyed increased statutory copyright protection in multiple dimensions other than just term extensions, such as increasing penalties, expanding international protection, and lowering formality requirements. *Id.* at 576-77.

<sup>97</sup> *Id.* at 570.

<sup>98</sup> *Id.* at 587.

<sup>99</sup> Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1669 (2009).

number of works produced, the authors examined production increases for individual categories of work following judicial and statutory expansions to copyright's scope. Number of registrations are a suitable proxy because, as the authors point out, registered works represent the authors who are most interested in benefiting from copyright law and thus their creative behavior ought to be the most sensitive to changes in copyright law.<sup>100</sup> In the aggregate, the research supports the arguments against copyright expansion, concluding that it is difficult to predict which legal changes will affect the number of new works created and that increases to copyright's scope rarely result in across-the-board production increases.<sup>101</sup> However, the findings related to the CTEA and other copyright term extensions tell a different story. For example, and extremely relevant for purposes of this Comment, the researchers found that the CTEA was associated with a twenty-seven percent increase in monograph registrations, a fifteen percent increase in serial registrations, and a twenty-three percent increase in sound recording registrations.<sup>102</sup> In addition, the *Eldred v. Ashcroft* decision, affirming the twenty-year term extension, was associated with a thirty-four percent increase in monograph registrations, a thirty percent increase in serial registrations, and thirty-six percent increase in sound recording registrations.<sup>103</sup> Overall, the researchers concluded that increasing the duration of copyright protection has a forty-five percent chance of increasing the number of copyright registrations.<sup>104</sup>

C. *Png & Wang: Evidence From the Movies*<sup>105</sup>

The only other paper to date that has sought to conclusively determine the CTEA's influence on production is *Copyright Duration and the Supply of Creative Work: Evidence From the Movies*, by I.P.L. Png and Qui-hong Wang. An early version of their working paper reviewed movie production in eighteen countries, looking for changes in production following a series of nearly identical expansions to copyright protection internationally (including the CTEA in the United

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<sup>100</sup> See *id.* at 1690.

<sup>101</sup> *Id.* at 1710.

<sup>102</sup> *Id.* at 1702.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1709.

<sup>105</sup> I.P.L. Png & Qui-hong Wang, *Copyright Duration and the Supply of Creative Work: Evidence From the Movies*, (Nat'l Univ. of Singapore, Working Paper, April 2009), available at <http://www.comp.nus.edu.sg/~ipng/research/copyrt.pdf> [hereinafter Png & Wang 2009].

States).<sup>106</sup> Based on information gleaned from the Internet Movie Database (IMDB), they initially concluded that there was a significant average increase of about 8.5% to 10.4% in worldwide movie production.<sup>107</sup> In the most recent iteration of the working paper, however, they have reversed this conclusion.<sup>108</sup> The research now suggests that copyright term extensions had no significant effect on the production of movies, music, or books.<sup>109</sup>

## V. PRACTICAL & NORMATIVE IMPLICATIONS OF THE RESEARCH

Although the research is limited, there is some empirical indication that copyright firms benefit from copyright term expansions. In particular, Baker and Cunningham present evidence that, after the CTEA, copyright firms enjoyed financial increases that were directly attributable to the copyright term extension. Their findings have implications for the theory that term extensions are successful financial incentives for firms. In addition, it is possible that firms will pass along these incentives to individual creators either directly, by paying higher prices, or indirectly, by offering more opportunities for authors to commercialize their work.

### A. *Financial Incentives to Firms*

By looking at the increase to firm equity, Baker and Cunningham overcome the difficulty that discounting might prevent both firms and individuals from viewing the term extension as a significant incentive. Equity markets are inherently forward-looking, and investors must make decisions based on their best expectations about future values.

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<sup>106</sup> Copyright duration is fairly uniform at the international level. Terms typically increased from “life plus fifty” years to “life plus seventy” years, in line with EU Directive 93/98/CEE. *Id.* at 6.

<sup>107</sup> I.P.L. Png & Qui-hong Wang, *Copyright Duration and the Supply of Creative Work: Evidence From the Movies 3* (Nat’l Univ. of Singapore, Working Paper, Dec. 2006), available at <http://www.dklevine.com/archive/png-duration.pdf> [hereinafter Png & Wang 2006]. Previously, Png had reported that although the increase in United States movie production following the CTEA was slightly positive, it was not statistically significant. See Kai-Lung Hui & I. P. L. Png, *On the Supply of Creative Work: Evidence from the Movies*, 92 AM. ECON. REV. 217, 219 (2002). This conclusion was condemned by several industry reports on the ground that Png’s research came too soon after the CTEA, and so did not account for lag time in movie production. See Png & Wang 2006, *supra*, at 5.

<sup>108</sup> See Png & Wang 2009, *supra* note 105, at 3.

<sup>109</sup> *Id.* at 11. The authors reached this opposite conclusion by correcting some errors in the dataset and removing their use of country-level time trends. Email from Ivan Png to Kelly Trimble (Feb. 20, 2012) (on file with author).

Because of this, Baker and Cunningham assumed that the price of equity already incorporates discounted future values. Essentially, the current market valuation of copyright firms necessarily includes a calculation about the value of existing copyright protection since that protection is an asset; by extension, increases in market value following copyright expansions indicate an increased present value of that protection. The results suggest that the market assigns a measurable and significant value to copyright term extensions. In this respect, it appears that the market is not subject to the irrational discounting that concerns copyright scholars with respect to individual authors. Though market players may also engage in discounting (either psychological or economic), the future values they expect are nevertheless substantial enough to increase investments and firm equity significantly in the present. These investments signal to firms the actual value of their copyright assets. Whereas individual authors and firm employees may use heuristics to calculate future returns, copyright firms as business entities receive a decisive valuation in the form of market investments.

Moreover, because equity markets are forward-looking, increases in value are calculated, discounted, and presented to firms immediately—there is no decades-long wait to realize the additional value of the longer copyright. This effect is perhaps the most relevant to the incentive inquiry. Assume for the moment that even very low discount rates will result in present values that are too small to incentivize any additional creation and that firms engage in this creation-detering discounting. On these facts alone, we might conclude that the discounting will prevent firms from increasing their creative production. However, the market serves as an incentive intermediary to firms, transferring a high valuation of the increased duration to firms by way of increased equity. Increases to equity make the additional expected revenue available immediately, counteracting the concern that firms will discount to the point of insignificance.

#### B. *Incentives from Firms to Individuals*

The availability of the increased expected revenue could encourage corporate authors to increase their production for one of two reasons. First, the increased equity could represent a perceived increase in the value of copyright protection; a more valuable copyright will, in theory, incentivize more creation. In this construct, the market transfers incentives to firms much as firms could theoretically transfer incentives

to individual authors.<sup>110</sup> Second, the additional equity could provide necessary funding for new projects, enabling creation that might not otherwise occur.

Baker and Cunningham were careful to qualify their findings by pointing to remaining uncertainty about where the extra value came from. Equity value could have increased either because shareholders anticipated that new works would be created as a result of the term extension or because the value of existing works increased due to the longer period for exploitation.<sup>111</sup> The authors seemed to place a great deal of importance on identifying the reasons for the increase and suggested that future research could seek to identify which of these influences is at play.<sup>112</sup> Their analysis concluded that if equity only increases because the values of existing copyrights have increased, there is no effect on new creation; in other words, the increase does not provide an additional *ex ante* incentive to create.<sup>113</sup> Alternately, they seemed to accept that increases to equity as a result of expectations about future production are a form of incentive, presumably because of the direct relation to future creation.<sup>114</sup>

I propose that the source of the increase is less important than its effects and suggest that researchers should focus more energy on the latter. There are two reasons, outlined above, why the source of the increase should have little import, even if equity increases purely in response to the increased value of existing copyrights. First, equity increases may help signal to authors that copyrights are worth more and will provide firms with a fund to pay more for works. The second reason is that increases to production might result in socially valuable effects even if authors are not individually responsive to the term extension as a future financial reward.

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<sup>110</sup> Of course, firms do not necessarily transfer the additional incentive by way of increased prices for authors. They may prefer to collect the revenue and consume it in other ways; however, this discretionary spending might also have implications for creation. *See infra* Part V.B.2.

<sup>111</sup> *See* Baker & Cunningham, *supra* note 71, at 593.

<sup>112</sup> *See id.*

<sup>113</sup> *Id.* (“[T]he equity market may simply be incorporating into prices the additional returns firms derive from an existing body of copyrighted works.”).

<sup>114</sup> *See id.* (“When copyright case law is broadened, equity market participants may anticipate a larger flow of new and profitable copyright works owing to the additional incentives provided authors and artists.”).



### 1. Effects of Equity Increases

The fact that existing copyrights are suddenly more highly valued could send a signal to creators that new copyrights will also receive a higher valuation. In essence, this is exactly how copyright protection is supposed to operate. Theoretically, the more valuable the copyright, the more incentive authors have to create. If authors see that existing copyrights become more valuable as a result of statutory expansions to copyright's scope, they may believe that new copyrights will also take on the higher value. Researchers should attempt to determine whether this type of signal acts as a financial incentive.<sup>115</sup> It is, of course, possible that authors either are not aware of the increased value that the market grants to copyright, or fail to demand a higher return for their copyrights for another reason. In this case, there would be no additional incentive attributable to signaling.

An increase in available capital could also mean that firms are able to pay more for creative works. Higher pay translates to greater financial rewards for creation, which would not be subject to irrational temporal discounting because they are made available in the present. In this way, the firm inherits a high valuation of new creation from the market, which it can then transmit to individual authors, resulting in an increased incentive for individuals to create.<sup>116</sup>

Unfortunately, there are difficulties with gathering the information that would be necessary to test the theory that increased equity translates to higher prices for creative works because there is little public information about actual prices paid to authors. Furthermore, even if financial information were readily available, it may be controversial to attribute increases in prices to the copyright term extension because of the multitude of other factors that contribute to prices for works. For example, an artist may be discovered, leading to dramatic increases in the price for his artwork; a screenwriter may win an award, enabling him to demand higher prices. There are endless external influences on the prices paid for copyrighted works and, as a result, there may be no way to judge the unique effect of a copyright term extension. At the

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<sup>115</sup> It is true that the copyright extension was more valuable for old, existing copyrights than for new or forthcoming copyrights. Assume a one-hundred-year copyright that generates one million dollars per year (at an interest rate of four percent). At year one of the copyright, the value of the last twenty years is only 2.41% of its total value. At year fifty, the value of the last twenty years is much higher—19.51% of its total value. Nevertheless, if authors do not engage in (or are not aware of) these complex calculations, the fact that there are evident increases may still act as a signal to prospective authors.

<sup>116</sup> *But see supra* Part III.B. (discussing practical reasons for firms to refrain from paying more for creative work).

very least, this type of inquiry would be incredibly time-consuming and tedious. This is not to say that it should not (or could not) be done. Research in the area is nonexistent, but ought to be a priority for advocates on both sides of the extension debate. If firms do not pay more for authors' works, then the industry's argument may be flawed. For those seeking to undermine attempts to extend the copyright term, this is potentially an important point. If firms are earning increased returns from copyright extensions without passing their gains to creators along the production chain, there is a normative question to be asked: should society endorse increased profits for these firms without gaining any direct financial benefit for individual creators in return? The answer may depend on whether equity increases lead to another form of social benefit, such as production increases.

## 2. Effects of Production Increases

Regardless of where the increased equity value comes from, more equity for the firm means more capital, which could be distributed in dividends, invested within the company, or invested in production. According to the producer-incentive model, if the availability of additional capital leads to more production, authors would have more opportunities to sell their works or participate in large-scale creative projects. This is essentially the argument made by copyright industries. More research needs to be done to find out whether production and opportunities for work actually increase following expansions to copyright protection.<sup>117</sup>

Ku and his colleagues have provided some valuable research showing that production does increase as a result of copyright term expansion by establishing that registrations increase for specific categories of work.<sup>118</sup> However, the authors generally deemphasize their findings, focusing on the creative activity that does not increase rather than activity that does.<sup>119</sup> They point out that increasing the scope of copyright may deter authors who would produce derivative works.<sup>120</sup> Unfortunately, there is no way to know whether there are more works

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<sup>117</sup> See *supra*, Part IV, reviewing the available research about production levels.

<sup>118</sup> See *supra* Part IV.B.

<sup>119</sup> Ku et al., *supra* note 99, at 1712 (concluding that there is a low likelihood of production increases when copyright protection is expanded, despite finding high percentages of registration increases across different types of creation when the copyright term is lengthened).

<sup>120</sup> *Id.* at 1714 (asserting that increasing protection may increase the cost of creation and consequently deter the creation of new works).

produced than deterred under the enacted regime.<sup>121</sup> They also seem to disapprove of the presence of uncertain effects in expanding copyright's scope, particularly the low ability to predict which expansions will cause a significant production increase for which types of work.<sup>122</sup> These concerns are certainly valid if the objective of copyright legislation is to consistently incentivize all creators. There is a compelling argument to be made that, because of the reduction to public access, any grant of copyright should be guaranteed to have a positive incentivizing effect on every potential author (especially given that some incentives might actually deter creativity).<sup>123</sup> If we truly want all copyright legislation to positively influence every form of creation, then the results of this research (combined with Png and Wang's findings regarding film production) do not support the current scope of copyright protection; it appears that any given copyright grant will have a significant effect on only a few categories of work.

However, legislation need not be consistently effective across all categories of creativity in order to incentivize additional creation. Society benefits even if only some authors respond to the new incentive by increasing their production.<sup>124</sup> If the primary goal of copyright expansions is to increase net production, increases need not be significant in every category to justify the expansion.<sup>125</sup> The available empirical

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<sup>121</sup> *Id.* at 1713. It is also particularly difficult to judge the quality of works that are not created compared to those that are, for the simple fact that they do not exist. For a full articulation of this problem, see Seana Valentine Shiffirin, *The Incentives Argument for Intellectual Property Protection*, in *INTELLECTUAL PROPERTY AND THEORIES OF JUSTICE* 97-99 (Axel Gosseries et al. eds., 2008).

<sup>122</sup> For example, the authors emphasize that it is difficult to predict whether a given change to the copyright regime will result in increased production, rather than exploring their finding that increases to the copyright term are highly likely to lead to increased creative production. See, e.g., Ku et al., *supra* note 99, at 1708-10.

<sup>123</sup> *Cf.* Shiffirin, *supra* note 121, at 100 (explaining that restrictions on speech, i.e., copyright, may be justified if necessary to produce works that are, in the aggregate, more socially valuable than free access to works).

<sup>124</sup> Liebowitz & Margolis, *supra* note 64, at 439 (arguing that even a marginal increase in the breadth of copyright will have an important incentive effect). Whether the societal benefit is greater than the harm from deferring entry to the public domain is the central question of the access-tradeoff debate, and is beyond the scope of this Comment.

<sup>125</sup> This may not be the primary goal of copyright expansions, and I do not endorse it as such. However, scholars often rely on production level as a proxy for the effectiveness of incentives (as Png & Wang and Ku et al. appear to do). Evidence confirming that production volume is the most socially valuable measure of creation would be useful. Studies showing that the CTEA caused only a negligible increase in production might strongly support the idea that we should limit future term extensions if we are interested solely in the raw number of works produced. Should society be more concerned with the number of works produced or with features such as the quality of creativity? Quantity has historically been the measure used in terms of speech to ensure that society receives the greatest benefit. For example, the First

research provides some support for the narrow idea that increasing the length of the copyright term leads to some increases in production.<sup>126</sup> By influencing significant production increases in at least three categories of work (monographs, serials, and sound recordings), the CTEA could thus be considered a successful incentive to produce more works.

Socially valuable benefits may follow if firms increase their productive output in response to term extensions. Increased firm-level production might provide individual authors with a broader scope of opportunities to create than they would have had absent production increases. From the standpoint of the copyright industry extension proponents, it might be helpful to learn more about the types of works that do demonstrably increase in numbers. Works that are particularly sensitive to changes in law and thus account for more registrations might involve a large amount of activity, enabling creation by multiple authors and granting opportunities that might otherwise be unavailable. For example, Ku, et al. found a thirty-six percent increase in sound recording registrations after the *Eldred* decision, indicating that these highly-collaborative works are strongly incentivized by term extensions.<sup>127</sup> Any given sound recording may require collaboration by songwriters, performing artists, recording artists, and other contributors. Thus, although there is only one copyright registration for the sound recording, the copyright may be associated with acts of creation by multiple individuals. In this case, extending the copyright term leads to more sound recordings, more involvement by individual authors, and more opportunities for these artists to profit from their creative production.

Similarly, Steven Hetcher uses the example of a Hollywood cinematographer hired to work on “a Brad and Angelina project” to illustrate some of the artistic opportunities made possible by the existence

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Amendment protects (nearly) all speakers, serving the ideal that more speech allows for more diversity of opinion, leading to a more robust societal discourse. High social value is given to quantity with the expectation that the best outcome is achieved when more information is exchanged and more ideas are heard. We might prefer to incentivize the greatest amount of creation possible in order to ensure that the range of creative viewpoints available for societal discourse and consumption is as broad as possible. Quantity might also be the most socially valuable measure of creation simply because it is the most easily quantifiable. It is much less challenging (and less controversial) to determine if production is increasing than to determine if works are becoming more creative. *Contra* Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 658-60 (2006) (contending that not all authors are created equal and advocating for “utilitarian math” to determine comparative value of works).

<sup>126</sup> Note that this conclusion is tempered by the difficulty of quantifying the amount of production the extension deters. *See supra* note 121 and accompanying text.

<sup>127</sup> Ku et al., *supra* note 99, at 1702.

of copyright firms.<sup>128</sup> A cinematographer might seek an opportunity to create a specific type of work involving controversial celebrities; however, this opportunity would likely be unavailable without the unique resources firms can provide, such as connections and a large budget.<sup>129</sup> Thus, if the types of work that increase in number of registrations grant a wide variety of opportunities for creation and artistic expression, a copyright-term extension could be found to play a significant role in increasing the scope and availability of opportunities for authors to participate in creative production. The potential effects outlined here are largely speculative and could be of only marginal creative value in practice. Very little evidence exists that indicates an increase in production volume; even less exists with regard to the number or quality of creators who are affected by production increases. To support their respective positions, both detractors and proponents of term extensions will need more research exploring the extent to which extensions actually increase production.

Whether the benefit from creation involving multiple authors is more valuable than the benefit of increased individual creation is likely to be unquantifiable and deciding which to prioritize requires a societal judgment call. Based on the existing empirical evidence about the types of creation that are most responsive to the incentive from copyright extensions, it seems that the current system favors increasing opportunity generally rather than directly increasing individual involvement. In other words, production by firms is more effectively incentivized than production by individuals. Practically speaking, the two models may provide comparable incentives to individuals. Increasing an author's odds of commercializing his creative contribution might be effectively the same as (or even preferable to) increasing the financial award for those authors who do successfully publish.

However, the final products that are created under each system might have varying creative worth. For example, a song written, performed, and recorded by one person will reflect that individual's unique perspective, voice, or style, whereas a song that results from a firm-sponsored collaboration will be a synthesis of many voices and styles, all moderated to some extent by the requests and mores of the producing label. Whether one of these products is a better enrichment

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<sup>128</sup> Steven Hetcher, *Desire Without Hierarchy: The Behavioral Economics of Copyright Incentives*, 48 U. LOUISVILLE L. REV. 817, 825 (2010).

<sup>129</sup> *Cf. id.* (illustrating the differences between writers, whose creative output is not constrained by high costs, and Hollywood camerapersons, who are limited to creating within larger projects, implying that the ability to create such works is facilitated by firms that have the requisite funding and access).

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of the creative landscape than the other is difficult to judge; this complex issue requires assessing which type of creation provides the optimal social benefit. Is society better off when more authors are able to take part in wide-scale production, or would more availability of works by individual authors provide a greater benefit? Future research should seek to establish which types of authors make the most beneficial creative contributions. The answer to that question will help scholars ascertain what type of incentive is socially optimal. A debate over the efficacy of copyright term extensions is meaningless without an assessment of the comparative value of the works produced under different incentive schemes. If firm-level production is ideal, then the financial incentives created by copyright term extensions may be acceptable after all.

## VI. CONCLUSION

In the midst of the academic turmoil over the best way to incentivize creation, the fact that different types of authors respond differently to different types of incentives must not be overlooked. Though behavioral heuristics may prevent individual creators from fully appreciating the financial incentives afforded by copyright term extensions, corporate authors may respond positively to these incentives in a number of ways. Term extensions give copyright firms financial rewards for their existing copyrights, which can increase the capital available for production of creative works. In turn, copyright firms may provide higher compensation or increased opportunities for individuals to create.

The plausibility of these proposed mechanisms needs to be studied in greater detail. If copyright firms merely absorb the additional financial rewards that term extensions provide, there is cause for concern about the longer terms' effectiveness as incentives. Nevertheless, there is some evidence of increased production attributable to copyright term extensions, and increased production might indirectly incentivize creation in socially valuable ways. Incorporating considerations about the differences between firm-produced and individually-created works into the copyright discourse will help inform our understanding of social goals and the aims of creative incentives. Consequently, scholars will be better able to determine which types of works deserve strong incentives. If one type of work is found to be of superior worth, an incentive system favoring producers of those works can—and should—be crafted. Opening the discussion to include a distinction between types of authors will advance the debate toward a discourse about the practical

way to incentivize the optimal level of creation. Only then will scholars be able to determine whether the CTEA's copyright term extensions provide socially optimal incentives.

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