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# Optional Copyright Renewal? Lessons for Designing Copyright Systems

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## **Optional Copyright Renewal? Lessons for Designing Copyright Systems**

**28th Annual Horace S. Manges Lecture, February 23, 2015**

R. Anthony Reese\*

### **INTRODUCTION**

When Register of Copyrights Maria Pallante gave the Manges Lecture two years ago, she suggested that we explore drafting the “Next Great Copyright Act.”<sup>1</sup> Creating that Act will require hard thinking about how to adapt copyright law to meet the challenges of our current legal, cultural, and technological era. But even with great ideas about how to adapt the law, creating the Next Great Copyright Act will also require designing a copyright statute that implements those ideas. Tonight, I’d like to explore the constraints and complexities that will confront the copyright bar as we try to design particular features of a “Next Great Copyright Act.”

As we think about copyright law revision, many different people will want to rewrite many different statutory provisions in many different ways. Revision ideas that have already been mentioned involve statutory licensing, public performance rights for sound recordings, recordation of transfers,<sup>2</sup> statutory damages, orphan works, a resale royalty for visual artists, federal protection for pre-1972 sound recordings, incidental copies, and digital first sale, just to name a few.<sup>3</sup>

I’d like you to join me in a thought experiment. In this lecture, I want to use one possible revision as an example to help explore the difficult problems that would have to be solved, or at least addressed, in figuring out how to implement that revision. As my title indicates, the revision I’m going to use for this thought experiment is copyright renewal. From the very first federal copyright act in 1790,

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\* Chancellor’s Professor of Law, University of California, Irvine. © 2015 R. Anthony Reese. This is a slightly expanded version of the 28th Annual Horace S. Manges lecture delivered in February 2015 at Columbia Law School. Thanks to Jane Ginsburg and the students in her spring 2015 seminar, as well as attendees at the lecture, including Graeme Dinwoodie and John Delaney, for helpful discussions on this topic. Thanks also to Jessica Litman, Lydia Loren, Pam Samuelson, Chris Sprigman, and Molly van Houweling for helpful discussion on designing copyright systems.

1. Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J. L. & ARTS 315 (2013).
2. Jane C. Ginsburg, “*With Untired Spirits and Formal Constancy*”: *Berne Compatibility of Formal Declaratory Measures to Enhance Copyright Title-Searching*, 28 BERKELEY TECH. L.J. 1583, 1611–21 (2013).
3. Pallante, *supra* note 1, at 323–336.

up through 1977, renewal was part of U.S. copyright law.<sup>4</sup> The law protected a copyrighted work for an initial term of protection. When that initial term of copyright expired, the work entered the public domain unless renewal formalities were complied with, in which case the law granted a second, renewal term of copyright in the work.<sup>5</sup> The 1976 Copyright Act ended this system of granting copyright protection in two separate terms of years,<sup>6</sup> and granted works created on or after its effective date of January 1, 1978, a unitary term of protection that generally lasts for the life of the author plus a term of years.<sup>7</sup>

For our thought experiment, I want to imagine revising U.S. copyright law to again divide a work's copyright term into two separate parts, and to condition the continuation of copyright protection for the work during the second (renewal) term on an affirmative act to renew the work's copyright. I won't spend much time examining whether or not it would be *desirable* to put a renewal feature back in U.S. copyright law. Instead, I will discuss copyright renewal in order to explore some lessons for designing copyright systems that I hope will be useful in thinking more generally about how to draft statutory provisions that implement many of the different kinds of revisions that might be considered as part of a Next Great Copyright Act. Some of these lessons are specific to copyright law. Others are not. But I hope that identifying them will help us write a better copyright statute.

## I. WHY RENEWAL?

### A. LENGTH OF TERM AND REVERSION OF OWNERSHIP

You may be asking, "Why renewal?" A renewal mechanism could address two different dissatisfactions that some observers have with the current copyright system. First, many people think the provisions allowing termination of an author's transfers of copyright to third parties are cumbersome and ineffective as a mechanism to ensure that an author reaps some of the financial benefit if her work proves to have long-lasting audience appeal.<sup>8</sup> Reversion has been described as an

4. Copyright Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831) (initial term and renewal terms of fourteen years); Copyright Act of Feb. 8, 1831, ch. 16, §§ 1–2, 4 Stat. 436 (repealed 1870) (initial term of twenty-eight years, renewal term of fourteen years); Copyright Act of Jul. 8, 1870, ch. 230, §§ 87–88, 16 Stat. 212 (repealed 1909) (same); Copyright Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (initial and renewal terms of twenty-eight years each). Indeed, as discussed *infra* note 6, renewal remained in place under the 1976 Act for works copyrighted before that act took effect.

5. ROBERT A. GORMAN, JANE C. GINSBURG, & R. ANTHONY REESE, COPYRIGHT: CASES & MATERIALS 411 (8th ed. 2011).

6. In fact, the 1976 Act only ended the renewal system prospectively. Works that had already been copyrighted before January 1, 1978 still have copyright protection divided into two separate terms. 17 U.S.C. § 304(a)–(b) (2012). Copyright renewal, however, became automatic in 1992. Copyright Renewal Act, Pub. L. No. 102-307, § 102, 106 Stat. 264, 264–65.

7. 17 U.S.C. § 302(a) (2012). As originally enacted, this section granted copyright for the author's life plus fifty years. The section was amended in 1998 to provide protection for a life-plus-seventy term. Sonny Bono Copyright Term Extension Act, Pub. L. 105-298, § 102, 112 Stat. 2827, 2828. See generally *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

8. 17 U.S.C. §§ 203, 304(c) (2012) (termination provisions of the current Copyright Act); see, e.g., R. Anthony Reese, *Termination Formalities & Notice*, BOSTON U. L. REV. (forthcoming 2016);

“equitable principle that authors should share in the long-term value of their works.”<sup>9</sup> As Paul Goldstein explains, “works that continue to enjoy commercial value” over a long period of time “are more likely to owe their success to the genius of their authors than to the capital and labor contributed by the author’s assignees or licensees” and therefore “the author has the stronger entitlement to the revenues earned” by the work in the later years of its copyright term.<sup>10</sup> Many observers see this principle as important to a copyright law that puts authors at its center.<sup>11</sup>

And second, many people think that copyright protection lasts much too long for many works. Not every blog post or snapshot likely needs protection for seventy years after the author’s death, even if some works with exceptional commercial or artistic value benefit from a term that long. In the view of many observers, this extremely long, one-size-fits-all copyright term does not serve the public interest.

Copyright renewal, of course, could address both of these dissatisfactions.<sup>12</sup> Indeed, it can perhaps do so in a way that, to use James Madison’s oft-quoted words, allows “[t]he public good [to] fully coincide[] . . . with the claims of individuals.”<sup>13</sup> As to the concern about copyright duration, renewal offers a *very* rough way to measure the length of copyright protection by the degree to which work continues to have value in its author’s eyes. In a renewal system, when the initial term of copyright ends, if the author doesn’t think the work’s value justifies spending the time and money needed to renew the work’s copyright, then the work goes into the public domain. The tailoring isn’t particularly precise. Throughout U.S. copyright history, copyright protection was divided into only two terms, so every copyrighted work was protected for one of only two possible time periods—at first, either for fourteen years or twenty-eight years, then for either twenty-eight years or forty-two years, and finally for either twenty-eight years or fifty-six years.<sup>14</sup> But renewal does allow some works to enter the public domain much

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Jane C. Ginsburg, *Author’s Transfer and License Contracts under U.S. Copyright Law*, in JACQUES DE WERRA, *RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY LICENSING* 13 (Edward Elgar 2013) (“The notice provisions [for statutory termination] are not author-friendly.”); Pallante, *supra* note 1, at 316 (“[T]he [termination] provisions as enacted are almost incomprehensible on their face, particularly for the authors, widows, widowers, children and other heirs who need to navigate them.”); Pamela Samuelson and the Members of the CPP, *The Copyright Principles Project: Directions for Reform*, 25 *BERKELEY TECH. L.J.* 1175, 1190, 1241–42 (2010) (provisions are “so cumbersome and complicated that most authors will not realistically have a meaningful opportunity to terminate”).

9. Pallante, *supra* note 1, at 316.

10. 1 PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* § 5.4, at 5:113 (3d ed. 2005 & Supp. 2012).

11. Lionel Bentley & Jane C. Ginsburg, “*The Sole Right . . . Shall Return to the Authors*”: *Anglo-American Authors’ Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 *BERKELEY TECH. L.J.* 1475, 1479–80, 1586 (2010).

12. BARBARA RINGER, *RENEWAL OF COPYRIGHT*, STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, 86TH CONG., 105, 187 (Comm. Print 1961) (“the main aspects of the renewal device—division of copyright duration into two terms and reversion of ownership—are two different things”).

13. THE FEDERALIST NO. 43, at 279 (James Madison) (Mod. Lib. Ed. 1941).

14. Copyright Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831) (initial term of fourteen years, renewal term of fourteen years); Copyright Act of Feb. 8, 1831, ch. 16, §§ 1–2, 4 Stat. 436, 436 (repealed 1870) (initial term of twenty-eight years, renewal term of fourteen years); Copyright

earlier than in our current unitary-term system. And our historical experience of relatively low renewal rates suggests that many copyrighted works may indeed not have sufficient value to justify renewing them.<sup>15</sup> A study of renewals made between 1910 and 1959 showed that during that period, fewer than 15% of expiring copyrights were renewed each year (although the rate of renewal rose fairly steadily during that time).<sup>16</sup>

As to the dissatisfaction with the current provisions on termination of transfers, when a work *does* have long-lasting value, renewal could offer a simpler and stronger means to provide that the rights in that work will, at some point, revert to the author who created it (and who, on this account is presumably largely responsible for that value).<sup>17</sup> A renewal copyright term can be structured as an entirely new grant of protection that can be vested automatically in the author, free of any transfers made during the initial term.

### B. BUILDING A BETTER RENEWAL MECHANISM

Of course, our own past experience shows that renewal is no panacea. But that experience can help us design a better renewal mechanism. For example, one of renewal's biggest problems was inadvertent forfeiture.<sup>18</sup> An author might well view her work as continuing to have value at the end of the initial term, but she might inadvertently fail to file a renewal registration with the Copyright Office. The consequence of her failure was that the work went irretrievably into the public domain. I think all of us who have missed a deadline or had an important financial payment completely slip our minds can understand how this might happen, even to the most organized of authors. But we could design a modern renewal system to help reduce inadvertent forfeitures.

Statutory drafting could help by not demanding absolute compliance with a rigid deadline. The law need not exact forfeiture of the renewal term whenever an author's paperwork arrives at the Copyright Office a day late.<sup>19</sup> Patent and trademark law both have grace periods built in to some deadlines that rightsholders must meet to maintain their rights.<sup>20</sup> Copyright law could certainly do the same.

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Act of Jul. 8, 1870, ch. 230, §§ 87–88, 16 Stat. 212 (repealed 1909) (same); Copyright Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (initial term of twenty-eight years, renewal term of twenty-eight years).

15. BARBARA RINGER, RENEWAL OF COPYRIGHT, STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, 86TH CONG., 105 220–24 (Comm. Print 1961).

16. *Id.* at 222–23.

17. GOLDSTEIN, *supra* note 10, at 5:113.

18. H.R. REP. NO. 94-1476, at 134 (1976) [hereinafter "1976 HOUSE REPORT"].

19. *See, e.g.*, BARBARA RINGER, RENEWAL OF COPYRIGHT, STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, 86TH CONG., 105, 188 (Comm. Print 1961) ("Even the problems of failure to meet the time limits might be ameliorated by provisions . . . for grace periods and reinstatement as in foreign patent and trademark laws.").

20. For example, the federal trademark statute requires the owner of a trademark registration periodically to file with the PTO affidavits concerning the continuing use of the registered mark. 15

We could automatically allow renewal if the application were received any time during the six months after it was due. And perhaps the Register should have the authority to accept a renewal application up to a year late upon a showing of good cause for the delay.<sup>21</sup> In addition, renewal provisions could be drafted so that all initial terms would expire on December 31 of their last year, as current copyright terms do, which should make it easier for authors to keep track of renewal deadlines.<sup>22</sup>

Technology can help, too. Where the work up for renewal has been registered, the Copyright Office could easily send a message to the author's last e-mail address on record reminding the author of the upcoming renewal deadline. Organizations that represent creators could send an email, say, every October, reminding their members of the upcoming December 31 renewal deadline. Those organizations, or private vendors, could also offer services where an author could sign up to receive personalized email reminders shortly before any work by the author is due for renewal.

History also teaches us how a modern renewal system could do a better job at effectuating reversion. Experience under the 1909 Act showed that renewal doesn't necessarily result in rights reverting to authors. Reversion was extremely incomplete under that Act,<sup>23</sup> but largely because the statute's language left the Supreme Court free to rule as it did in the *Fred Fisher Music* case—that authors could validly convey away in advance any rights they might eventually acquire when a work's copyright was renewed.<sup>24</sup> This meant that when a publisher signed a contract with an author at the very beginning of a work's copyright term, the publisher could demand that the author sign over her rights for both the initial and renewal terms. As a result, although the statute formally vested the renewal term copyright in the author, the renewal-term rights often immediately transferred to the publisher under the parties' original contract from decades earlier.

Here again, a modern renewal system could do better. The statute could expressly provide that renewal-term rights could not be validly *conveyed* in

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U.S.C. § 1058(a)–(b)(1)(A) (2012). The statute provides a one-year period during which such affidavits may be filed. 15 U.S.C. § 1058(a)(1)–(2). But the statute also provides that the owner may file such affidavits “within the 6-month grace period immediately following the expiration of the periods established” by statute (though it requires an additional fee for such late filings). 15 U.S.C. § 1058(a)(3); *see also* 15 U.S.C. § 1059 (allowing registrant to file application for renewal of trademark registration to be filed “within a grace period of 6 months after” the expiration of the statutory deadline for filing the application).

Similarly, the Patent Act requires a patent owner to pay maintenance fees at three points during the life of a patent in order to keep the patent from expiring. 35 U.S.C. § 41(b). The statute, though, provides that the patent will only expire if the payment is not received “on or before the date the fee is due *or within a grace period of 6 months thereafter*” (though a patent owner who pays the maintenance fee during the grace period may have to pay a surcharge as well). 35 U.S.C. § 41(b)(2) (emphasis added).

21. *See, e.g.*, 15 U.S.C. § 1051(d)(4) (allowing the Director of the Patent & Trademark Office to extend a trademark applicant's time for filing of a verified statement of use where the Director is satisfied that the applicant's failure to file the statement by the statutory deadline “was unintentional”).

22. 17 U.S.C. § 305 (2012).

23. *See Bentley & Ginsburg, supra* note 11, at 1550–64.

24. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 656–57 (1943).

advance, and that any *promise* to convey such rights would be unenforceable. Indeed, Congress drew on the experience with assignments of renewal copyrights under the 1909 Act when it drafted the current termination of transfer provisions, which generally provide that the rights that will revert after a transfer is terminated cannot effectively be transferred again until after those rights actually revert to the terminating party.<sup>25</sup> In drafting these provisions, Congress seems to have done a more effective job than it did with renewal rights under the 1909 Act of making attempts to transfer reverted rights in advance invalid, and those improvements could be embodied in a new renewal system.

Thus, a modern renewal mechanism might be worth considering as part of a revised copyright act as a way both to improve on the current statute's reversion provisions and to mitigate some of the consequences of our very long copyright term. And past experience should help us to design a better renewal system than we had before.

In considering whether to make renewal part of a revised copyright act, I begin in Part II by looking at whether we could adopt a renewal system consistent with our obligations under international copyright treaties. Because a mandatory renewal system would likely conflict with those obligations, I don't propose replacing the current provisions on copyright term with a renewal system. Rather, I want to explore the possibility of supplementing those provisions with an option for choosing a renewable copyright. This would mean that while the law would, by default, provide a copyrighted work with the unitary term prescribed in the current act, the work could, by voluntary election, be protected for an initial term and then protected for a second, renewal term only upon compliance with required renewal formalities.

Implementing such an opt-in renewal system would require many decisions about how to design the system, and I explore several of them in Parts III through V. Part III considers how a work's copyright would be made renewable, rather than being governed by the default unitary term, and examines both who should be able to choose a renewable copyright, and when we should allow that choice to be made. Part IV considers the duration of a renewable copyright, in particular how long the initial and renewal terms should last. Part V considers renewal itself, looking at who should be able to renew a work's copyright when the initial term ends, and what reversionary consequences should follow a work's renewal.

## II. RENEWAL AND INTERNATIONAL COPYRIGHT OBLIGATIONS

### A. MAKING RENEWAL OPTIONAL

The elephant in the room in thinking about returning to renewal is the Berne

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25. See 17 U.S.C. § 203(b)(4) (2012). The statute also provides a limited exception that allows the party terminating a transfer to agree to regrant the reverted rights to the terminated grantee after the rights that will revert have vested in the terminating party, but before the reversion actually takes effect. *Id.*

Convention<sup>26</sup> (together with our undertaking in the TRIPS Agreement to comply with most Berne requirements).<sup>27</sup> These international obligations mean that we could not simply adopt a copyright system dividing the term of protection into two parts and requiring an author to register in order to obtain the second part. That would run afoul both of the Berne Convention's demand that copyright protection generally last until fifty years after the author's death,<sup>28</sup> and its prohibition on subjecting the enjoyment and exercise of copyright to any formalities.<sup>29</sup>

Technically, the United States could impose the renewal system on works of U.S. origin. The Convention's minimum standards apply by their own force only to the protection we provide to authors who are nationals of other countries that belong to the Berne Union, not to the protection we provide to U.S. authors.<sup>30</sup> But we are unlikely to treat U.S. authors in such a dramatically different fashion than we treat authors from other countries.

As this Article's title indicates, though, our Berne obligations are not necessarily insuperable obstacles to a renewal system. The Berne Convention doesn't say that an author can't *choose* a shorter term of protection, or can't *choose* to subject her continued enjoyment of copyright to a formality such as renewal registration. Our international obligations only prevent us from *imposing* such a system. So we could comply with those obligations and still adopt renewal, as long as we give authors the option to have renewal provisions apply to their works. The statute could provide an option for an author of any particular copyrightable work to choose a renewable copyright, rather than the basic unitary life-plus-seventy-year copyright term, for that work. The author could make that choice simply by registering her work with the Copyright Office as renewable.

Perhaps, though, the Berne Convention's description of "the term of protection granted by" the Convention as life-plus-fifty might be interpreted to bar a formal grant, even at the author's election, of some shorter term.<sup>31</sup> Even that reading wouldn't necessarily doom an optional renewal system, though it would require some creativity in structuring it. Under this reading of our Berne obligations, we would perhaps need to use the mechanism of dedication to the public domain to create an optional renewal system. The Berne Convention doesn't prohibit an author from choosing, during her work's copyright term, to dedicate that work to the public domain. And I see no reason why an author cannot make a *conditional*

26. Berne Convention for the Protection of Literary and Artistic Works, Sept. 28, 1979, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3 [hereinafter "Berne Convention"].

27. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 9, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (requiring members to comply with articles 1 through 21, but not article 6*bis*, of the Berne Convention).

28. Berne Convention, *supra* note 26, art. 7(1).

29. Berne Convention, *supra* note 26, art. 5(2).

30. PAUL GOLDSTEIN & BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT 38 (2d ed. 2010) ("The Convention's minimum standards do not apply in the country of origin. . . ."); 1 SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND § 6.53, at 278 (2d ed. 2006) ("[S]o long as a member state affords the minimum Berne protections to authors whose countries of origin are in *other* Union states, it can provide far less to authors whose works originate in that state.")

31. Berne Convention, *supra* note 26, art. 7(1).



dedication. Therefore, we could implement optional renewal by having an author sign a formal, irrevocable, but conditional dedication of her work to the public domain. The dedication would be effective on a fixed date in the future, but only if the author did not file a renewal application in the Copyright Office before that date.

### B. MAKING OPTIONAL RENEWAL ATTRACTIVE

So, despite our international obligations, the Next Great Copyright Act likely could include renewal, as long as renewal is optional. Imagining renewal as an optional alternative immediately raises the question of why any author would choose that option. After all, doing so would bind the author to complete a formality at some future date in order to continue to enjoy copyright protection that she would otherwise be guaranteed. Thus, we would presumably need to provide some compensating incentive to induce authors to choose the renewal route.

The incentive could be reversion. If the author signed up for a renewable copyright, then the entire ownership of the renewal-term copyright would vest in the author if the work's copyright is renewed when the initial term expires. And, as suggested above, that reversion could be made much closer to absolute than under the 1909 Act. The statute could provide that no conveyance, purported conveyance, or promised conveyance of any rights in a work's renewal-term copyright would be valid or enforceable if the conveyance were made before the renewal term actually vested. This would effectively give the renewing author a new copyright, free of any transfers or licenses she had granted during the initial copyright term.

How strong this incentive would be is hard to predict. Reversion would provide the strongest incentive for authors to choose renewal copyright if optional renewal replaced the current termination-of-transfer mechanism. That would leave renewal as the author's only route to reversion, which could well provide substantial incentive for many authors to register their works for renewable copyright.

But of course, that would mean that the baseline copyright provided to every author who did not opt for renewal would not include any reversion mechanism at all. Those who believe strongly that reversion is an important benefit for authors generally would no doubt prefer to add optional renewal as a reversion mechanism above and beyond the current termination regime. If optional renewal only supplemented termination of transfers as an alternative reversion mechanism, then some features of renewal would need to be more attractive than termination in order to induce authors to affirmatively choose renewal as a reversion mechanism, instead of simply relying on the termination regime, which would remain available by default to all authors. This decision—whether optional renewal would replace the termination provisions or supplement them—will thus drive many of the subsequent decisions that will need to be made about how to structure the optional renewal system and what benefits renewal will provide to the author. And the cost of making renewable copyright an attractive option may be denying reversion to those authors who don't choose renewal.

The first lesson I draw for designing copyright systems in a new copyright act is that international obligations will substantially affect how we design those systems. Many features that we might want to adopt as part of a new copyright act could run afoul of our obligations if we implement them as mandatory provisions. That doesn't mean we can't adopt them, but it will mean that we have to make them voluntary and that we will have to offer incentives to get authors and copyright owners to choose those provisions.

This tension between international obligations and domestic goals is not entirely new, of course. While the Berne Convention does not allow us to require registration as a condition to copyright protection,<sup>32</sup> U.S. copyright law has continued to see substantial value in copyright registration.<sup>33</sup> So we allow, but do not require, registration, and as an incentive to register we provide benefits above and beyond what copyright owners otherwise receive—remedial advantages such as the availability of statutory damages and attorney's fees,<sup>34</sup> and litigation benefits such as the evidentiary value of a registration certificate.<sup>35</sup> We can do this because the incentives are benefits that Berne doesn't require us to provide. But the more voluntary mechanisms we include in our copyright statute, the more creative we will have to be in coming up with benefits to serve as incentives. And the need to make these voluntary mechanisms more attractive may lead us to reduce the benefits we provide by default for every copyrighted work.

### III. HOW TO MAKE A WORK'S COPYRIGHT RENEWABLE

I want to turn now to some of the details that would need to be worked out if we wanted to create an optional renewal system. Because it is not feasible to address all of these details in this lecture, Parts III through V will explore only the following: who can opt in to renewable copyright, when the choice to make a copyright renewable could be made, how the copyright term should be divided, who can renew a copyright when the time comes, and what reversionary effect renewal will have.

#### A. WHO CAN CHOOSE RENEWABLE COPYRIGHT FOR A WORK?

##### 1. Only Authors?

Optional renewal could be implemented by granting any particular work a renewable copyright only if the work is registered with the Copyright Office as

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32. Berne Convention, *supra* note 26, art. 5(2). Legislative disagreement over whether requiring registration as a prerequisite to instituting a suit for copyright infringement constituted a prohibited formality under the Berne Convention led Congress to apply that requirement only to works of U.S. origin. 17 U.S.C. § 411(a) (2012); JOINT EXPLANATORY STATEMENT ON HOUSE-SENATE COMPROMISE INCORPORATED IN SENATE AMENDMENT TO H.R. 4262, 134 CONG. REC. 10096 (Oct. 12, 1988).

33. See H.R. REP. NO. 100-609, at 40–42 (1988).

34. 17 U.S.C. § 412 (2012).

35. 17 U.S.C. § 410(c) (2012). A registration certificate has this evidentiary effect only if registration is made before or within five years after the first publication of the work registered. *Id.*

renewable. This presents one of the first design decisions we will need to make: who gets to choose, for any particular work, between the default unitary copyright and a renewable copyright. The basic answer here seems obvious: the work's author should have the right to choose. This answer is driven largely by the same international obligations that led us to make renewal optional. The Berne Convention generally regulates our treatment of authors, so providing a different kind of copyright shouldn't violate our obligations as long as a work's author chooses a regime other than the default required by Berne. Allowing someone other than the author to opt in to renewable copyright—such as someone to whom the author has transferred the work's copyright—probably would contravene Berne. The author would be subjected, against her will, to a shorter term of protection than required by the Berne Convention and to an obligation to comply with prohibited renewal formalities in order to enjoy the full term of copyright in her work.

But allowing only the author herself to opt in to renewable copyright will likely lead to inequitable outcomes in certain circumstances. Imagine the author who completes the manuscript for what will eventually turn out to be universally acknowledged as *The Great American Novel*. She realizes that as a relative unknown seeking to publish her first novel, she'll likely have to accept relatively unfavorable financial terms to get the work published. But she's confident that in the future (when the time comes to renew) the book will be a commercial and critical success and she'll be able to reap a larger share of the financial rewards of that success. Therefore, after she finishes writing, she plans to register her work for a renewable copyright the very next day. Tragically, though, the author dies suddenly, before she is able to register for a renewable copyright. If the statute allows only the author to opt in to renewal, then our author's novel cannot be covered by a renewable copyright.

In these circumstances, allowing only the author to choose the renewable copyright seems arbitrary, denying renewability based on the chance timing of the author's death. If she was right about the likely future of her work, her survivors will not be able to use renewal to secure reversion of rights in the novel after its initial success. And denying her survivors the opportunity for reversion might be especially unfair, because they might need the benefits of a future renegotiated deal all the more acutely because they were deprived of the author's support in the interim. To account for such situations, we could provide that the author may choose a renewable copyright or, if the author is dead, then the author's survivors may make that choice.<sup>36</sup>

This problem illustrates another lesson. Designing a copyright system will

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36. Of course, we would then have to identify *which* survivors may make the choice. We could let whoever inherits the author's copyright in a work (either under the author's will or by intestate succession) also inherit the right to register the work for renewable copyright. Or copyright law could override ordinary inheritance rules and specify who inherits the right to choose a renewable copyright, regardless of who inherits the deceased author's other copyright interests. This same issue recurs, and is discussed in Part V.A., below, in the context of determining who, if anyone, should be able to renew a renewable copyright if the author is dead when the time comes to renew.

sometimes require trade-offs between statutory simplicity and achieving our goals in the widest variety of factual circumstances in which the statute will apply. Commentators have recognized that the current statute is often unclear and sometimes nearly incomprehensible. Any revision should produce a more understandable and accessible statute.<sup>37</sup> Relatively straightforward statutory provisions can likely cover what we view as the core or paradigm circumstances we seek to address. In this case, requiring the author to opt in to a renewable copyright will easily handle most cases at the core of our concern: most authors will have the time, after they finish creating their work, to decide whether to choose a renewable copyright. But this straightforward statutory requirement won't work well for cases away from the core, such as this example, where the author dies so soon after finishing her work that she has no reasonable opportunity to choose a renewable copyright. We can often provide for such circumstances. But doing so requires drafting more detailed statutory provisions, which will introduce complexity and, potentially, unexpected outcomes. So we will sometimes face a choice. We can adopt a fairly straightforward approach, and accept, as a cost of that approach, that some authors in unusual situations will not be able to benefit from the provision. Or we can try to anticipate the circumstances not only of the paradigmatic author, but also of the unusually situated author, and draft provisions that will encompass all those circumstances, but at the cost of a more complicated, and possibly unpredictable, statute.

## 2. Which Author?

Even if we decide that only an author should be able to choose a renewable copyright, we will need to think more about which author. Again, the paradigm situation that I think we have at least in the back of our minds when we think about drafting copyright provisions is the author I just described, who labors and eventually produces a novel that may or may not turn out to be *The Great American Novel*. But of course copyright covers other types of authorship, and copyright law often treats those types of authorship differently. Most notably, optional renewal would need to account for works of joint authorship.<sup>38</sup> Who can choose a renewable copyright where two or more authors have collaborated and produced a joint work?

Allowing one co-author to decide for all co-authors may contravene the Berne Convention. Those authors who do not themselves opt in would be forced, by

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37. Pallante, *supra* note 1, at 339; Samuelson & the CPP, *supra* note 8, at 1181–82 (articulating guiding principles for copyright law that call several times for “clear and sensible rules” (emphasis added)).

38. For works made for hire, under current law the hiring party for whom the work is made (rather than the actual person or persons who created the work) is the “author” of the work. 17 U.S.C. § 201(b) (2012). If that approach carries forward in a revised statute, concerns about reversion of transferred rights to a work’s original author will generally have less relevance for works made for hire. It might therefore make sense to exclude works made for hire from optional renewability, just as the current statute makes termination of transfers inapplicable to works made for hire. 17 U.S.C. § 203(a)(1) (2012).

someone else's action, to comply with the renewal formality in order to enjoy the work's full copyright term. The fact that their co-author's choice would also give them the benefit of reversion would likely not justify imposing the renewal burden on them, since they may not value reversion enough to accept the renewal formality in exchange.

We could instead require that a majority of the co-authors agree in order to choose a renewable copyright. The current statute, of course, takes that approach for termination of transfers. Again, though, allowing a majority of co-authors to impose on the others a formality (and possibly a shorter term of copyright) is likely inconsistent with our international obligations to each author.

Another alternative would be to allow one co-author to choose a renewable copyright only as to her own contributions to the joint work. This seems likely to be unworkable, at least under our current approach to joint authorship. U.S. copyright law has generally been quite reluctant to attempt to identify each co-author's contributions to a joint work and to treat those contributions separately. Our general rule is that each co-author owns an equal undivided fractional interest in the *whole* work, not only her own contributions.<sup>39</sup> And each co-author is entitled, on her own, to exploit (or license others to exploit) the entire joint work, not just her contributions.<sup>40</sup> Allowing a single co-author to choose renewable copyright only as to her contributions to the joint work would therefore require a parsing of co-authors' contributions that we have not previously required, and that courts have been understandably reluctant to undertake. Sometimes the analysis might be relatively easy—for example, where one author independently writes a song's lyrics and another, acting separately, writes the song's music. But there is no reason to think that most joint works—perhaps even most jointly authored songs—will be susceptible to anything like such a simple identification of each author's contributions.

Even if we were willing to require such dissection of joint works, that dissection would likely create some problematic consequences for renewal. If only one co-author of a joint work chose renewable copyright and then she failed to renew, the outcome seems clear. That co-author's contributions would enter the public domain and the public could use them, though the public couldn't use the contributions of the other co-authors who did not choose renewal.<sup>41</sup> But what if the co-author who opted for renewable copyright for her own contributions does

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39. GOLDSTEIN, *supra* note 10, § 4.2.2 at 4:25–4:26.1.

40. GOLDSTEIN, *supra* note 10, § 4.2.2 at 4:25–4:26.1.

41. This situation would be similar to the doctrine that copyright protection for derivative works, and for the underlying works on which they are based, is independent. 17 U.S.C. § 103(b) (2012). As a result, if an underlying work remains protected by copyright while the term of protection in a derivative work has expired, only the derivative work author's contributions to the derivative work are in the public domain, and available to be freely used, by virtue of the expiration of the copyright. *See Russell v. Price*, 612 F.2d 1123, 1128 (9th Cir. 1979). Conversely, if the underlying work's copyright term has ended, while the term of protection for the derivative work has not, then while the underlying work is in the public domain and free for everyone to use, the copyrightable contributions of the derivative work author remain protected. *See Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496, 500–501 (7th Cir. 2014).

renew? Renewal's reversionary effect would mean that any transfers of her rights in her contributions that she had made during the work's initial copyright term should no longer be valid. But what about any licenses that her coauthors had granted in the entire joint work, and what about those co-authors' continuing right to exploit the entire work? One co-author's renewal shouldn't cause reversion of those rights. So a transferee whose rights in the work reverted in part to one renewing co-author could simply turn to any of the other co-authors to get a new grant of rights in the same work, or could possibly simply continue to rely on the original grant from the co-authors who didn't choose renewal.

Thus, for joint works, perhaps the only viable approach is requiring that all of the work's co-authors join in choosing renewable copyright in order for the choice to be effective.

This demonstrates another lesson. Designing a new (or revised) copyright provision requires careful thinking about interactions with the existing complexities of the copyright statute and copyright law. Drafting a provision addressed to "authors" means having to account not only for sole authors, but also for co-authors of joint works and potentially for hiring-party authors of works made for hire. Copyright law covers very different types of "authorship," and has complicated differences in how it treats each category of authorship. Drafting or revising copyright provisions that apply across the spectrum of authorship types means accounting for those differences. And this lesson applies to more than just authorship. Copyright's application to a wide array of subject matter categories, and its grant of several different exclusive rights, will also sometimes complicate how a copyright provision needs to be designed if it applies across the board.

#### **B. WHEN CAN THE CHOICE OF RENEWABLE COPYRIGHT BE MADE?**

If we allow authors to opt in to a renewable copyright, we'll need to decide when they can opt in. Both goals of renewal—reversion to the author and potential early entry into the public domain—generally seem best served by having an author opt in sooner rather than later. Therefore, we might require the author to register for a renewable copyright no later than five years after she first disseminates the work to the public.

Such a requirement, though, would raise a host of complications and concerns. We can predict from our experience with the concept of "publication" under past copyright acts that disputes will arise over what constitutes "dissemination to the public."<sup>42</sup> Perhaps we can craft a careful definition of that term that will resolve most of the questions that arise. But we should still expect disputes in particular cases about exactly when a work was first disseminated to the public under our definition. Put yourself in the shoes of a copyright transferee in an optional renewal system. After you've owned the copyright for the work's entire initial term, the author renews, and asserts that the copyright has reverted to her. If the

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42. For a brief introduction to the complexities of the concept of "publication" under the 1909 Act, see GORMAN, GINSBURG, & REESE, *supra* note 5, at 493–505

copyright still has value, you have every incentive to try to invalidate the renewal. You may well want to argue that the author registered the work for renewable copyright too late, because she did so more than five years after she first disseminated the work to the public. To resolve that dispute, we will have to determine the facts of what the author did many years earlier. Such disputes will likely be hard to resolve after so much time has passed.<sup>43</sup> But if renewal is available only if the author acted in a timely manner decades before the time comes to renew, we will inevitably have to resolve factual disputes about actions that happened quite a long time ago.<sup>44</sup>

In addition, we may end up not just with disputes between a transferee and a renewing author, but also between a transferee and members of the public. If the author of a renewable work does not renew the copyright and secure the reversion, the work instead goes into the public domain. A transferee of the work's copyright still has every incentive to claim that the author's choice of renewal decades earlier was untimely, but the author has little financial incentive to dispute this claim.<sup>45</sup> And a third party who wants to use the work will often not have access to the evidence needed to establish what the author did decades earlier.

Perhaps, then, we shouldn't impose a time limit on when an author can register for renewable copyright, and just hope that most authors will do so early in a work's life in order to secure the benefits of reversion sooner rather than later. That would save us from having to decide, when the time for renewal comes, whether the author's choice years earlier to make the work renewable was timely.

Nevertheless, we'll still need some limits on when the author can register her work as renewable. In particular, it would be unfair to allow the author to transfer rights in her work to a third party, and then to register the work for a renewable

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43. Many cases have involved whether an author or a copyright owner properly complied, at some date far in the past, with formalities required to obtain or maintain copyright protection, even though by the time the question gets to court, copyright law no longer requires the formality in question. *See, e.g.,* Warner Bros. Entm't, Inc. v. X One X Prods., 644 F.3d 584, 592–95 (8th Cir. 2011) (evaluating whether activities in 1939 constituted "publication" triggering statutory notice requirement); Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 194 F.3d 1211, 1214–17 (11th Cir. 1999) (evaluating whether events in 1963 constituted "publication" of Dr. King's "I Have A Dream" speech, triggering the statute's notice requirement); Acad. of Motion Picture Arts & Sciences v. Creative House Promotions, Inc., 944 F.2d 1446, 1451–54 (9th Cir. 1991) (evaluating whether events from 1929 to 1941 constituted "publication" triggering the statute's notice requirement).

44. We might try to get such disputes resolved earlier by, for example, requiring that anyone who thinks that an author's registration of a work as renewable was untimely must object to the registration within the first five years after it is made. Potential objectors would need to periodically review the Copyright Office's records to monitor new registrations of works as renewable, in the same way that those who wish to oppose the registration of trademarks on the Principal Register must monitor the PTO's official trademark gazette to identify marks that have been approved for registration and are subject to opposition. Requiring such monitoring of copyright registrations by everyone who has a potential interest in a work's renewability, however, seems potentially quite burdensome.

45. The author may have chosen not to renew the work's copyright because she affirmatively wanted it to enter the public domain, and that desire may provide some incentive to dispute the transferee's challenge. While that desire may be sufficient incentive for the author not to act (by not registering for renewal), it may not be sufficient to induce the author to incur the expense that would likely be necessary to contest the transferee's claims.

copyright. After all, the transferee may have bargained with the author to own the copyright for its entire term, only to now discover that although she paid for ownership of the full term, she will only get the initial-term copyright.

Perhaps, then, the author should only be able to register her work as renewable before she has transferred or licensed any rights in the work to a third party. That would be a simple statutory rule that would protect transferees and licensees from having their transactional expectations undermined by later unilateral action by the author. But given the actual range of possible market transactions, the protections that rule would offer to transferees are likely to be both too broad and too narrow.

What if the author licensed her work to a publisher for only one year, with no right to extend the license? Or what if the author has made her work available online, perhaps to test the market, and has granted YouTube or Amazon the nonexclusive rights they need to supply the author's work to their customers, but only for as long as the author chooses to make her work available on their site? Because many nonexclusive licenses are terminable by the licensor at will, a nonexclusive licensee would often have no expectation of a continuing right to use the work during the entire copyright term that would be disrupted by allowing the author to register the work as renewable.<sup>46</sup> A simple rule that requires the author to register for renewability before she grants *any* rights to third parties would prevent the author in these situations from registering that work as renewable, even though making her work renewable would not affect her licensees in these instances in any way.<sup>47</sup>

Furthermore, a rule requiring registration for renewability before an author *makes* any transfer might also be insufficiently protective of transferees. After all, an author might sign a contract with a publisher in which she *promises* to transfer to the publisher the copyrights in all of the works she creates in the following five years. When she actually creates a new work, this rule might allow her to register it for renewability because she has not yet *actually* transferred the copyright in the work. But the publisher, who thought it was getting ownership of the entire copyright when it contracted with the author, would now only be getting ownership of the work during an initial term.

A more nuanced rule is probably required, which would permit the author to register her work as renewable as long as she has not transferred any rights in the work for a period lasting longer than the initial copyright term, and she is under no enforceable obligation to transfer such rights.<sup>48</sup>

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46. See, e.g., *Walthal v. Rusk*, 172 F.3d 481, 485 (7th Cir. 1999); *Korman v. HBC Florida, Inc.*, 182 F.3d 1291, 1296 (11th Cir. 1999).

47. Similarly, this simple rule would prevent an author from registering her work as renewable if she had earlier transferred the work's copyright to a publisher, even if all of the rights had later reverted back to her under the terms of the transfer (perhaps, for example, because the publisher allowed the work to go out of print). But allowing that author to register that work as renewable would not appear to affect the former transferee (the publisher) in any way.

48. We might deal with this problem by adopting a standard, rather than a rule, for when an author may register her work as renewable. For example, we might allow registration at any time when no one other than the author has any interest in the work that would be unreasonably impaired by making the work renewable. This approach would possibly make it easier to achieve the statute's goals



Even under this more nuanced rule, we might still be concerned about timely resolution of disputes over renewability. When an author asserts that she has renewed a copyright and that therefore rights she had previously transferred have reverted to her, her transferee will still have an incentive to claim that the author's renewal is invalid because she registered her work as renewable after she had already transferred rights to the publisher. We could again find ourselves having to resolve factual disputes over conduct that happened decades earlier.

In this case, however, tying the timeliness of renewability registration to transfers rather than to public dissemination could make it easier to resolve disputes by using copyright's system for recording transfers.<sup>49</sup> The statutory recordation system currently resolves conflicts among multiple transfers: the first-filing bona fide purchaser for value generally prevails over an earlier transferee who does not record.<sup>50</sup> But recordation could also resolve disputes over renewability. We could provide that an author's registration of her work as renewable would be valid as long as no earlier transfer or license of rights in the work was timely recorded in the Copyright Office. We could then resolve disputes over whether the author registered her work for renewal in a timely manner decades ago largely by reference to Copyright Office records, without the need to ascertain the facts of the author's long-ago transactions. And for a transferee who fails to record, the effect of losing rights in a transferred work during its renewal term would appear no worse than under current law, where failure to timely record can result in complete loss of the transferred rights to a later good-faith transferee without notice.

Again, we see that we may need to trade off the desire for a relatively straightforward copyright provision against the need to accommodate the wide variety of actual circumstances in which the provision will apply. An additional lesson here is that this variety of circumstances may be quite wide when we are dealing with copyright transactions. The complete divisibility of copyright and the relatively few legal restrictions on transferability mean that there may be as many different types of copyright transactions undertaken as there are types of authors, publishers, and uses. Any copyright provision that interacts with copyright ownership may need to account for exclusive transfers and nonexclusive licenses, for promises to convey rights in the future, for mortgages and securitizations of copyright, and for multiple transferees of different rights in different territories for different times. Predicting how a statutory provision will interact with the almost limitless variety of copyright conveyances can be a challenge.

Designing this aspect of renewal provides another lesson as well. Making important consequences—such as continued ownership of copyright, or even the continued existence of copyright—turn on acts that occurred many years earlier and that are not authoritatively reflected in some official registry is likely to cause problems. We can reduce those problems by relying on registration and

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in unanticipated factual situations. But it would likely increase the cost of administering the provision, in the form of the need to make individualized factual determinations of when a work can and cannot be registered as renewable.

49. 17 U.S.C. § 205 (2012).

50. 17 U.S.C. § 205(d) (2012).

recording systems, though doing so will in some instances extinguish otherwise valid claims.

#### IV. HOW LONG SHOULD THE INITIAL & RENEWAL TERMS LAST?

Once we decide how to make a work's copyright renewable, we must turn our attention to renewal itself. First, we need to decide when a renewable copyright will need to be renewed—that is, how long will the initial term last?<sup>51</sup>

A relatively short initial term may help authors. A shorter initial term should mean that, when the time comes to renew, authors are less likely to have died or to have forgotten about their renewal interest, and so authors may be more likely to renew the copyright in their works. Also, more works may have continuing value at the end of a shorter initial term than at the end of a longer one, making reversion more valuable to the author. Most works will probably have a larger audience twenty years after their initial release than forty years after, so an author who regains rights in the work after twenty years stands a better chance of making money during the work's renewal term than an author who regains the copyright after forty years.

Those who see renewal as a path for works to enter the public domain sooner might also favor a short initial term, though the optimal length of the initial term for maximizing this goal is less clear. The shorter the initial term, the sooner unrenewed works will enter the public domain. However, a shorter initial term may also mean that more works overall are renewed than would be the case if the initial term lasted longer. If, as suggested above, works are more likely to retain commercial value at the end of a shorter initial term than at the end of a longer one, then authors may be more likely to renew their works rather than to let them enter the public domain when the initial term ends.

By contrast, the interests of transferees would almost certainly argue against a short initial term. If renewal provides for truly robust reversion of rights to the author, transferees will only be able to effectively acquire rights for the initial term. They'll want the initial term to last as long as possible, so that they can have as long as possible to recoup any investments they make in exploiting those rights.

The entire premise of renewable copyright rejects a transferee's strongest claim that she should be able to acquire copyright for a work's entire term, from the beginning, on whatever terms she can negotiate with the author, and should be able to enjoy that copyright undisturbed until it expires. But adopting a renewable copyright doesn't mean denying that transferees often add value in disseminating copyrighted works and in creating derivative works. Nor does it mean denying that transferees need and deserve to recoup their investments, and that authors may not generally want, or be able, to exploit their works on their own and will rely on

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51. We might consider dividing our renewable copyright into more than two parts. Multiple renewals would give the author multiple opportunities to recapture rights in her work, and provide multiple opportunities for a work to enter the public domain if it no longer retains enough value to renew. A full discussion of this possibility is beyond the scope of this lecture, so I proceed on the assumption that we would divide the copyright term for renewable works into only two parts.

transferees to do so. So even while a renewal system insists that at some point the author should have the chance to renegotiate the terms of a transfer for any work that proves to have lasting commercial value, renewal should aim to give transferees rights for long enough that their businesses can succeed and flourish.

From this perspective, the key problem in setting the length of the initial term is that it is hard to know, particularly for all of the many different kinds of works covered by copyright law, what initial period is long enough for transferees to continue to operate successfully in copyright markets, to the benefit of themselves, of authors, and of the consuming public. Empirical evidence is sparse, and the answer may well be different for popular music than for documentary film or contemporary dance. Perhaps the best we can do is look to past experience. Until 1978, a transferee could acquire a copyright with certainty only for twenty-eight years. Any rights beyond that time were entirely contingent.<sup>52</sup> And under current law, a transferee can only acquire a copyright with certainty for thirty-five years, with ownership after that period wholly dependent on whether the author exercises her unwaivable statutory right to terminate the transfer.<sup>53</sup>

Given the relative explosion of authorial production and dissemination over the last century, it seems safe to say that copyright transferees have been able to succeed in a system where they could not acquire copyrights from authors with certainty for longer than twenty-eight or thirty-five years at a time. This suggests that an optional renewal system with an initial term of about twenty-five or thirty years should give transferees enough time to exploit the works they acquire. And a twenty-five or thirty year initial term would offer authors some incentive to choose renewal over termination of transfers if both are available, since termination is available at the earliest only thirty-five years after a transfer is executed.<sup>54</sup>

If a twenty-five or thirty year initial term would give transferees what they need to acquire and exploit copyrightable works, would works still have enough value at the end of that initial term that reversion through renewal would benefit the author? Today, the commercial value of many more works may continue over a longer period of time than in the past. Consider a movie made in 1950. After its initial cinematic release ended, opportunities for continuing to extract value from the film were relatively limited. Most cinemas showed primarily new releases, and wouldn't be interested in showing older movies again. Television offered some possibilities, but in the 1950s and 1960s, there were relatively few television stations, and correspondingly few opportunities to show an old movie on television. Virtually no one had the home screening equipment to create any demand for the sale of prints to the public. Today, of course, the opportunities are much greater.

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52. For works created under the 1909 Act, the Supreme Court described an attempt to transfer rights during the renewal term as only a transfer of an "expectancy" or of a "contingent interest." *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 375, 378 (1960); *see also*, *Stewart v. Abend*, 495 U.S. 207, 217, 219–20 (1990).

53. 17 U.S.C. § 203 (2012).

54. In some cases, the termination will not be available until forty years after the grant is executed, or thirty-five years after the work is published, whichever comes first. 17 U.S.C. § 203(a)(3) (2012).

Even if movie theaters don't show old films any more often than they did in the 1950s and 1960s, the plethora of television channels available on most cable systems means many more chances for the copyright owner to get paid to show an old movie on TV. On-demand movie streaming services such as Amazon Instant Video and Netflix mean that an old movie can find an audience even if only one person a week wants to watch it, something that wouldn't have been possible before. And the widespread adoption of home video players—both DVD and Blu-ray players and software for viewing downloaded movies on computers and mobile devices—has created a flourishing market for selling copies of old movies to the general public. Similar changes in technology and markets for many other kinds of works may have similar effects. As a whole, this may mean that many more works will have value for a longer period of time. So a renewal copyright that starts after twenty-five or thirty years may have value for more authors than ever before.

Choosing a twenty-five or thirty year initial term is perhaps not a perfect solution, but it offers another lesson in copyright design. History matters. It certainly isn't determinative, and we should not write the same copyright law we have had in the past just *because* we had that law in the past. But history does matter. We will often have to draft legislation without substantial direct empirical evidence about how the alternatives we might consider would actually operate in practice. To the extent we can look to historical precedents that have worked, at least relatively successfully, we can take some comfort that following such precedents, or at least using them as starting points and making what seem like sensible modifications, may allow new provisions to succeed as well.

However long the initial term lasts for renewable copyrights, we will also need to set the length of the renewal term. The easiest approach would be to have the renewal copyright simply last for the remainder of the work's ordinary term—generally, under current U.S. law, the author's life plus seventy years.<sup>55</sup> But we could use the optional renewal system to provide a shorter overall term than we do under current law. And this term could even be shorter than the minimum life-plus-fifty term generally required by the Berne Convention.<sup>56</sup> This would be possible because in a system in which the author chooses a renewable copyright, she would also be choosing a shorter term, rather than having it imposed upon her.<sup>57</sup> We could, for example, set the total term of protection available for renewable works at seventy years, in the form of a twenty-five or thirty year initial term, plus a forty-five or forty year (respectively) renewal term.

How would the length of such a renewable copyright compare to the default

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55. 17 U.S.C. § 302(a) (2012). For joint works, the term is generally the life of the last surviving author plus seventy years. 17 U.S.C. § 302(b) (2012).

56. Berne Convention, *supra* note 26, art. 7(1), *7bis*. For certain kinds of works, the Berne Convention only requires countries to provide shorter terms of protection. Berne Convention, *supra* note 26, arts. 7(2)–(4).

57. Similarly, a shorter total available term of protection for renewable works in an optional renewal system would not run afoul of obligations the United States has undertaken in bilateral or regional free trade agreements to provide a copyright term of life plus seventy years, longer than required by the Berne Convention. See R. Anthony Reese, *Copyrightable Subject Matter in the "Next Great Copyright Act,"* 29 BERKELEY TECH. L.J. 1489, 1498 n.37 (2015).

unitary copyright provided by the statute? In a few instances, a total available term of seventy years would amount to the same length as the current life-plus-seventy term. For example, if an author died the day after opting in to renewable copyright, the total available term of protection for that author's work (if the copyright were renewed at the end of the initial term) would be the same as if she had not opted for renewal: the life of the author, plus seventy years. Of course, in most instances, a seventy year maximum term would mean that an author who chooses a renewable copyright would, even if she renews the work's copyright, enjoy fewer years of copyright protection than she would enjoy under a life-plus-seventy term, since most authors will not die in the same year in which they opt for renewability.

But if we make the total possible term of protection for a renewable copyright substantially shorter than the ordinary term, that may make optional renewal less attractive to authors in the first place. Whether authors find a total of seventy years of protection available for a renewable copyright substantially less attractive than a term of seventy years after the death of the author will likely depend in large part on how an author values additional years of copyright protection late in the copyright term and after the author's death. The drafters of the 1976 Copyright Act viewed that statute's copyright term for works made for hire as roughly approximating the average length of the term based on the life of the author.<sup>58</sup> If this view holds true now that twenty years have been added to all of the terms originally adopted in the 1976 Act, then on average the current life-plus-seventy term should roughly yield a term of protection of ninety-five years, the length of time that published works made for hire are protected.<sup>59</sup> Therefore, on average, choosing a renewable copyright with a maximum term of seventy years would mean that an author is roughly giving up the value of the copyright on her work in what would otherwise be the last twenty-five years of the copyright term. Of course, since the author will likely be long dead by the time that these last twenty-five years of protection arrive, the author might well place a greater value on having ownership of her work's copyright revert to her, via renewal, at the end of the initial twenty-five or thirty year term.<sup>60</sup>

This discussion of how long the initial and renewal terms should last in an optional renewal system suggests more generally the difficulty of reconciling multiple goals in designing copyright systems. Obviously different constituencies—authors, transferees, and the public at large—may have different goals that argue for or against specific provisions. But even designing any particular feature of copyright law may require taking into account differing goals for that feature. Do we want optional renewal in order to improve reversion of

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58. 1976 HOUSE REPORT, at 135, 137 (stating that "the Register's 1961 Report included statistics indicating that something between 70 and 76 years was then the average equivalent of life-plus-50 years," and setting the term for works made for hire at seventy-five years from publication).

59. 17 U.S.C. § 302(c) (2012).

60. Of course, in an optional renewal system, an author would be able to evaluate the desirability of making any particular work renewable on an individual basis, rather than on comparison of average terms. A younger author would likely get a shorter overall term under a seventy-year renewable copyright than under a standard life-plus-seventy copyright, while an older author would likely be giving up fewer total years of protection by opting for a renewable copyright.

rights to the author, or to facilitate early entry of works into public domain, or to reduce the overall length of the copyright term? Or some combination thereof? At the very least, some combination of the first two goals motivates putting a renewal feature into copyright law. But in crafting particular details of a renewal system, these different goals may point in different directions and may require us to sacrifice the fullest achievement of one goal in order to better achieve another.

## V. RENEWAL AND ITS CONSEQUENCES

Finally, to design an optional renewal system, we'll have to specify some of the details of actually renewing the copyright, and the reversionary consequences of doing so.

### A. WHO CAN RENEW?

The question of who can renew when the time comes will be easy in many cases: the author should get to decide whether to register the work for copyright during its renewal term. But that question becomes more complicated if the author dies before the time comes to renew.

Allowing only a living author to renew seems likely to be unfair in some circumstances. Why should an author who, sadly, dies one day before the time comes to renew not be able to obtain renewal, while an author who renews on the first day possible, and then dies, can secure the much longer total term of protection given by the renewal term? Indeed, reversion might be more important for a work by a deceased author, who may well have left behind dependents whom she can't continue to support.

Therefore, we should probably provide that if the author is not alive when the time comes to renew, *someone* should be able to renew. But who? This is a familiar—and, if you'll pardon the pun, a familial—problem. We encountered it earlier in asking who could register a work as renewable, and past statutes have grappled with it.<sup>61</sup>

We could provide that a deceased author's heirs or devisees succeed to that author's right to renew her work and own the renewal copyright. This solution would be simpler than the current and historical approaches to identifying reversionary parties when the author dies before reversion takes place.<sup>62</sup> We see in the current termination provisions in Section 203 that the statute can become quite complex in mandating which of an author's surviving family members succeed to the author's reversion rights, and in what shares.<sup>63</sup> You might think that to be a copyright lawyer you wouldn't ever need to understand the term *per stirpes*, but the

61. See *supra*, Part III.A.1.

62. For example, the 1909 Act specified in detail who was entitled to renew if the author was dead when the time came to renew. Renewal could be made "by the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright." 1909 Act, § 24.

63. 17 U.S.C. § 203(a)(2) (2012).

termination of transfer provisions would prove you wrong.<sup>64</sup>

These statutory complexities stem largely from concern that without them, a transferee will try to prevent reversion by contracting with the author not only to acquire the author's copyright, but also to require the author to make a will bequeathing to the transferee the right to obtain the reversion. If the publisher imposes such a requirement and the author dies before reversion happens, then the rights that the author transferred would effectively remain with the transferee under the author's will. If one purpose of reversion is to provide a deceased author's surviving family members with the possibility of financial support from exploiting reverted rights in the author's work, allowing the author to designate by will who obtains the reversion can enable a transferee to defeat that purpose.<sup>65</sup>

Perhaps a compromise would let us draft simpler statutory language than the current provisions but would still offer some protection against a transferee demanding that an author leave her post-mortem reversionary interests to the transferee. We could allow an author to designate by will who can renew if the author has died when the time comes for renewal. We could simultaneously provide that any *agreement* to bequeath the right to renew a work's copyright is invalid and unenforceable, and that if an author's will fails to carry out any such agreement it would not be subject to challenge or reformation on that ground. This should prevent transferees from being able to effectively require by contract that authors leave them the renewal copyright by will.<sup>66</sup>

This approach would not, of course, ensure that a deceased author's renewal interest could be exercised by the author's surviving immediate family. The author could choose to bequeath the right to renew to the author's adulterous lover rather than to the author's spouse, or to the author's favorite philanthropic foundation rather than to children that author views as ungrateful sponges.<sup>67</sup> This solution would thus sacrifice, to some extent, the full implementation of the view that copyright reversion should protect "widows and orphans," and would not take extraordinary steps to ensure that only an author's immediate survivors succeed to the renewal interest. But it would be much simpler than current (and previous) reversion provisions, and it would have the advantage of respecting the author's own testamentary intent.

Again, we see a trade-off between keeping the statute simple and implementing

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64. 17 U.S.C. § 203(a)(2)(C) (2012) provides that if a deceased author is survived by children and/or grandchildren, then the termination rights "of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented."

65. See R. Anthony Reese, *Reflections on the Intellectual Commons: Two Perspectives on Copyright Duration and Reversion*, 47 STAN. L. REV. 707, 727–29, 733 (1995).

66. Of course, this approach would not effectively address the problems of the *in terrorem* effect of publishers including in their contracts a clause requiring the author to leave the renewal interest by will to the publisher. Many authors might not know that this contractual clause would be unenforceable under copyright law, and might therefore comply with the clause and will their termination interests to their publishers, even if they would prefer not to do so.

67. For an example of a case in which an author apparently attempted to will his renewal copyright interests to a philanthropic foundation rather than to his estranged children, see Saroyan v. William Saroyan Found., 675 F. Supp. 843 (S.D.N.Y. 1987).

the full range of statutory goals. To the extent that we intend reversion to benefit the author and her immediate family, we face a choice. We can accept that deferring to the ordinary rules regarding transfer of property on death will sometimes not benefit that family. Or we can try to ensure that the author's immediate family gets to renew, but at the cost of a more complicated statute and of potentially complicated interactions between copyright law and the law of wills and estates.

### B. REVERSION UPON RENEWAL

Finally, we need to consider the reversionary consequences of renewal. The consequence of failure to renew would be straightforward: the work would enter the public domain. And the basic reversionary consequence of renewal is clear: copyright in the work during the renewal term should vest in the author, or the author's heirs or devisees, free of any transfers made or promised during the work's initial copyright term. As noted earlier, to help ensure that reversion operates this way, the statute must provide, as the 1909 Act did not, that neither the author nor anyone else can validly convey any rights in the renewal copyright during the work's initial copyright term. The statute should expressly make any purported conveyance or promise to convey such rights invalid and unenforceable.

But other questions about how robust reversion should be are more complex—in particular, questions about the effect of reversion on derivative works. Assume that, during a work's initial copyright term, the work's author licenses someone else to produce a derivative work. When the author renews the copyright, and the renewal copyright vests in the author, must the licensee renegotiate a new license to use the author's work in the licensee's derivative work during the renewal term?

U.S. law has taken different approaches to this issue at different times. Under the 1909 Act, the *Stewart v. Abend* decision, involving Jimmy Stewart's and Alfred Hitchcock's movie *Rear Window*, made clear that the owner of the derivative work did have to negotiate with the owner of the underlying work's renewal copyright in order to keep using the derivative work.<sup>68</sup> By contrast, the current termination of transfer provisions allow a transferee to continue to use a derivative work that it prepared under the terms of the transfer, even after the transfer of the right to make the derivative work is terminated.<sup>69</sup>

Recall that for an optional renewal system we need to provide authors an incentive to choose to make their works renewable.<sup>70</sup> If renewal were to provide reversion of copyright ownership to the author that includes the derivative work right, this would offer authors a stronger incentive to opt in. Certainly, if optional renewal were an alternative to the termination of transfers regime, rather than a replacement for it, providing reversion of the derivative work right could encourage authors to opt for renewal by making it more advantageous than termination, which does not allow a terminating author (or her successors) to completely reclaim the

68. *Stewart v. Abend*, 495 U.S. 207, 220–30 (1990); see Reese, *supra* note 65, at 731–32.

69. 17 U.S.C. § 203(b)(1) (2012).

70. See *supra*, Part II.B.



derivative work right.

Allowing a renewing author to recapture the derivative work right should also reduce post-reversion disputes about whether or not a transferee has prepared a derivative work. Under current termination law, a terminated transferee has every incentive to argue that it has not simply exploited an author's work but has prepared a derivative work, so that the transferee can enjoy the privilege to continue using the work after termination.<sup>71</sup> A book publisher, for example, might claim that its final published edition of an author's novel is a derivative work—representing the publisher's editorial revisions to the version that the author originally submitted.<sup>72</sup> If that claim is correct, then even after termination of the author's book contract, the publisher could continue to market the novel under the current termination provisions. If, by contrast, an author who *renews* a renewable copyright could reclaim *all* previously transferred rights in her work, including the right to make and use derivative works, then the incentive for a transferee to claim to have prepared a derivative work should disappear.

Nevertheless, such complete reversion has its downsides. It burdens the creators of derivative works. Their inability to secure from the outset the right to use the underlying work for the entire copyright term often means that they won't be able to effectively exploit their own creative authorial contributions during the underlying work's renewal term (or will have to pay a substantially greater price to do so).<sup>73</sup> Complete reversion burdens the public as well, since if the renewing author of the underlying work and the author of the derivative work can't agree on a new license, the public will not have access to the derivative work for the remainder of the underlying work's copyright term.<sup>74</sup>

Complete reversion might even create problems for the author who chooses to make her work renewable. Imagine an author opts in to a renewable copyright for her work. Next, imagine that ten years before the work is due for renewal, a producer wants to make a derivative work based on the author's work. This might be a movie version of a novel, or a movie or television "reboot" of a comic book series. Of course, the author can only effectively convey derivative rights to the producer for ten years, because, as discussed above, rights during the renewal term cannot be conveyed in advance (and advance promises to convey such rights are not enforceable). But the producer may not be able to justify the investment needed to produce the derivative work if the producer will only have ten years to recoup that investment. In this situation, even if the parties can agree on financial terms, the derivative use won't get made, and the author of the underlying work won't get paid. Ten years later, once that author has renewed the copyright and can freely grant derivative rights for the much-longer remainder of the renewal copyright term, the producer may no longer be interested in creating the derivative

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71. 17 U.S.C. § 203(b)(1) (2012).

72. The statute's definition of "derivative work" includes "[a] work consisting of editorial revisions . . . which, as a whole, represent an original work of authorship." 17 U.S.C. § 101 (2012) (defining "derivative work").

73. See, e.g., *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir. 1977).

74. Reese, *supra* note 65, at 746–47.

work.

We could address this problem, even if we provide complete reversion, by tweaking our approach to the inalienability of renewal term rights during the initial term.<sup>75</sup> Instead of forbidding all transfers of renewal-term rights entered into before renewal occurs, we could enforce pre-renewal transfers and licenses *if* they are entered into during, for example, the last five years of the initial copyright term.<sup>76</sup> This would allow the author to convey renewal term rights when the renewal term is approaching, and should make rights in the work more marketable late in the initial term than they otherwise would be. And if we relax the inalienability of renewal-term rights only late in the initial term, then in most instances there should already be sufficient information about the long-term value of the work for the author to be able to strike a deal on terms similar to those she could get after she renewed.

Once again, though, this solution means making the statute more complex, and possibly opening the door to unintended consequences (particularly for attempts to circumvent the goal of strong reversion of renewal-term rights to the author), in order to deal with issues perhaps only faced by a relatively small subset of authors.

## VI. CONCLUSION

There are many other aspects of an optional renewal system that could be discussed, but I will conclude by summarizing what I think are the most important lessons that trying to design such a system can teach us more generally about designing copyright systems.

First, and perhaps most importantly, our international obligations will significantly constrain our choices in creating a new copyright act. The next general copyright revision will be the first that we undertake while being bound by most of these obligations. These international constraints mean that many ideas we might want to try would have to be implemented on a voluntary basis, which will put a premium on finding ways to encourage authors or copyright owners to choose something different than what they are guaranteed by international agreements.

Second, we are likely to continually face the trade-off between drafting simple, straightforward statutory language and providing targeted solutions for particular issues faced only by some authors in some situations. We may decide that those specific issues are important enough to address in the act. But the more we draft the statute to cover special circumstances, the more exceptions and refinements we'll need to add to the basic rules. This will make the statute more complicated, less understandable, and potentially more susceptible to misinterpretation or

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75. See *supra*, Part I.B.

76. The current termination provisions already provide an exception to the basic rule that transfers of reverted rights are not valid unless made after the rights have reverted. That exception validates retransfers of reverted rights back to the terminated original transferee, as long as the subsequent transfer is made after a notice of termination is served on the grantee being terminated. 17 U.S.C. § 203(b)(4) (2012). Because notice can be served as much as ten years in advance of the date of termination, a terminating party can under this exception regrant rights that will revert to it up to ten years before the reversion actually takes place. 17 U.S.C. § 203(a)(4) (2012).

manipulation. At some point, we may decide that, even though our general rule may pose hardships for authors or transferees in a small number of instances, we'll accept that as the cost of a more straightforward copyright system.

Third, in designing features of our copyright system, we will have to take account of the complexities of the environment in which those features will operate. In part, this means considering the complexities of copyright law itself. Copyright treats sole-authored works, jointly authored works, and works authored for hire differently from one another, and the rest of the statute must interact with that differential treatment. Copyright protects works as different as pop songs and orchestral symphonies, as different as bubble-blowing plastic Santa Claus figurines and maps depicting who owns which piece of property in a given county.<sup>77</sup> While a few statutory provisions vary with the kind of subject matter involved, most do not, and instead must work for most or all kinds of copyrightable works. In addition to the complexities of the law itself, many possible statutory provisions will need to account for the extremely diverse set of transactions that authors and copyright owners actually enter into in the market place.

Lastly, I don't mean to suggest in any way that we should not, as Register Pallante asked in the Manges Lecture two years ago, think "big" and "boldly" in coming up with the Next Great Copyright Act.<sup>78</sup> The present state of copyright law, of culture, of technology, and of markets demands big and bold ideas for copyright revision. Optional renewal may or may not be a big or bold idea, but the goal of this lecture has been to identify some of the challenges we'll face in translating big and bold ideas about copyright revision into actual systems of copyright law implemented in concrete statutory terms. Translating big and bold ideas into actual effective legislation will be hard, but it will be worth the effort.

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77. Kurt S. Adler, Inc. v. World Bazaars, Inc., 897 F. Supp. 92 (S.D.N.Y. 1995); Mason v. Montgomery Data, Inc., 967 F.2d 135 (5th Cir. 1992).

78. Pallante, *supra* note 1, at 336, 344.