

# "The Song Is Ended But the Melody Lingers On": Protecting the Cultural History of the Great American Songbook in the Face of the Public Domain

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**“THE SONG IS ENDED BUT THE MELODY  
LINGERS ON”<sup>1</sup>: PROTECTING THE  
CULTURAL HISTORY OF THE  
GREAT AMERICAN SONGBOOK IN  
THE FACE OF THE PUBLIC DOMAIN**

MOLLIE GALCHUS<sup>†</sup>

“LET’S BEGIN”<sup>2</sup>:

Let’s begin with a round of “Name That Tune.” Play these notes on any instrument you may have, and try to guess the song:

D, G, F#, G, A, E, A (hold for two beats)  
G, F#, E, F#, G (hold for four beats)  
D, G, F#, G, A, E, A (hold for two beats)  
G, F#, E, F# G (hold for four beats)  
Rest  
B, B, B (hold for two beats)  
B, B, B, (hold for two beats)  
B, A, G, A, B (hold for four beats)  
B, B, C, B, A, E, A, G, G, F#, A, G (hold for two beats)

You would find that the melody you just played is one of Elvis Presley’s 1956 hits, “Love Me Tender.” But this would be only partly true. These same exact notes also form the melody of

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<sup>1</sup> IRVING BERLIN, THE SONG IS ENDED (BUT THE MELODY LINGERS ON) (Irving Berlin Music Corp. 1927).

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<sup>2</sup> JEROME KERN & OTTO HARBACK, LET’S BEGIN (T.B. Harms Co. 1933).

the 1861 song “Aura Lee,” written by George Poulton.<sup>3</sup> However, almost everybody associates this melody with Presley; it would be rare to find somebody who even knows who Poulton is.

It was, and still is, legal to take the exact melody of a song in the public domain, add new lyrics, and take the credit for the new work.<sup>4</sup> Since “Aura Lee” was in the public domain in 1956, Presley was able to transform the melody into a new copyrightable work.<sup>5</sup> While “Aura Lee” is not the only piece to have ever been transformed into another copyrightable work, this type of transformation, in which a person uses a preexisting work without seeking permission to do so, never legally happened to any musical work created after 1922—until January 1, 2019.<sup>6</sup> That is, while Americans were busy ushering in 2019, the copyright landscape changed overnight. The Sonny Bono Copyright Term Extension Act (“CTEA”) of 1998, which had frozen the public domain for twenty years, expired when the clock struck midnight and the calendar flipped from 2018 to 2019.<sup>7</sup> On January 1, 2019, copyrighted musical works from 1923 entered the public domain,<sup>8</sup> where they are now subject to copy, distribution, and use, without requiring permission, a license, or fee.<sup>9</sup> The same will happen for each year’s worth of works beyond this year: in 2020, 1924’s works will enter the public domain; in 2021, 1925’s works will enter the public domain; in 2022, 1926’s works will enter the public domain; and so forth.

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<sup>3</sup> Max Cryer, *The Story Behind the Song*, THE TELEGRAPH (Oct. 17, 2008, 12:01 AM), <http://www.telegraph.co.uk/culture/music/3562247/The-story-behind-the-song-Love-Me-Tender.html>. William Whiteman Fosdick wrote the lyrics to “Aura Lee,” a nineteenth-century ballad that became a popular war song during the Civil War. *Id.* Almost 100 years later, the music director of Elvis Presley’s film *Love Me Tender* found “Aura Lee” in the public domain. *Id.* The song was set to new lyrics, but its melody remained exactly the same. *Id.* “Love Me Tender” topped the Billboard charts for five weeks, and has been closely associated with Presley ever since. *Id.*; see also DAVID J. MOSER & CHERYL L. SLAY, *MUSIC COPYRIGHT LAW* 96, 135 (2012).

<sup>4</sup> See MOSER & SLAY, *supra* note 3, 135.

<sup>5</sup> See *id.* at 135.

<sup>6</sup> *Copyright Term and the Public Domain in the United States*, CORNELL UNIVERSITY LIBRARY COPYRIGHT INFORMATION CENTER, <https://copyright.cornell.edu/publicdomain> (last updated Jan. 10, 2018).

<sup>7</sup> Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 413 (2002).

<sup>8</sup> Joseph P. Liu, *The New Public Domain*, 2013 U. ILL. L. REV. 1395, 1396 (2013).

<sup>9</sup> See Liu, *Copyright and Time: A Proposal*, *supra* note 7, at 414.

Works of the Great American Songbook are some of the first pieces of music to now enter the public domain after the expiration of the CTEA.<sup>10</sup> The Great American Songbook is one of the greatest cultural achievements of the United States.<sup>11</sup> While the Songbook does not consist of a definitive list of songs, it can be thought of as a genre consisting of popular song standards, the bulk of which were composed in the 1920s, 1930s, and 1940s.<sup>12</sup> These songs were written most notably by Irving Berlin, brothers George and Ira Gershwin, Jerome Kern, Cole Porter, songwriting team Richard Rodgers and Lorenz Hart, Duke Ellington, Harold Arlen, Dorothy Fields, Yip Harburg, and Johnny Mercer.<sup>13</sup> The craftsmanship of these standards, written in the second quarter of the twentieth century, is apparent from the songs' sophistication, melody, innovation, and artistry.<sup>14</sup> These songs were the foundation for American enterprises such as jazz, Broadway, Hollywood musicals, dance, and the recording industry.<sup>15</sup> For example, of the 1,200 songs that Berlin wrote, "perhaps 100 are still instantly recognizable, at the heart of American music," including "White Christmas" and "God Bless America"—songs engrained in American culture.<sup>16</sup>

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<sup>10</sup> Liu, *The New Public Domain*, *supra* note 8, at 1397–98.

<sup>11</sup> BEN YAGODA, *THE B-SIDE: THE DEATH OF TIN PAN ALLEY AND THE REBIRTH OF THE GREAT AMERICAN SONG* 6 (2015). *See also* Liu, *The New Public Domain*, *supra* note 8, at 1397 (noting that important musical works, such as songs by George Gershwin and Irving Berlin, that will soon pass into the public domain, are "some of the most iconic and important American cultural works ever produced, encompassing the artistically rich decades of the 1920s, 1930s, and 1940s."). *See also* *What is the Great American Songbook?*, THE GREAT AMERICAN SONGBOOK FOUNDATION, <https://www.thecenterfortheperformingarts.org/Great-American-Songbook-Initiative/About-the-Great-American-Songbook> (last visited Oct. 25, 2018).

<sup>12</sup> YAGODA, *supra* note 11, at 2. *See also* Liu, *The New Public Domain*, *supra* note 8, at 1402–03 (noting that the public domain already contains music from before 1923, including early popular music of Tin Pan Alley, ragtime, and early works of jazz).

<sup>13</sup> YAGODA, *supra* note 11, at 3–4. Yagoda divides the composers and lyricists of the Songbook into two groups: those born in the seventeen-year span between 1885 and 1902 which includes Irving Berlin, George and Ira Gershwin, Jerome Kern, Cole Porter, Richard Rodgers, Lorenz Hart, Duke Ellington, Arthur Schwartz, Harry Warren, Hoagy Carmichael, Richard Whiting, Vincent Youmans, Walter Donaldson, Jimmy McHugh, Oscar Hammerstein II, E.Y. "Yip" Harburg, and Howard Dietz, and the slightly younger group born between 1903 and 1910 which includes Harold Arlen, Vernon Duke, Dorothy Fields, Frank Loesser, Johnny Mercer, Jule Styne, and Fats Waller. *Id.*

<sup>14</sup> *Id.* at 2–3.

<sup>15</sup> *Id.* at 6.

<sup>16</sup> Jesse Green, *Theater Review: Holiday Inn, Where I'm Dreaming of a Copyright Extension*, VULTURE (Oct. 6, 2016), <http://www.vulture.com/2016/10/>

Congress should not extend the duration of copyright now that the CTEA is expired. Further extensions would be contrary to the Constitution's Copyright Clause which allows Congress to create limited copyright terms in order to promote progress of the arts.<sup>17</sup> However, though music should eventually enter the public domain, the contrast between music's stringent protection under copyright law and its vulnerability in the current public domain is unworkable. This unworkability is especially apparent when considering the cultural and historical significance of the Great American Songbook. Congress should introduce safeguards into the public domain to protect the legacies of composers and cultural music history, so that the composers of the Songbook do not become forgotten like the composer of "Aura Lee."

Part I of this Note discusses the history of American popular song from the late nineteenth century to the mid-twentieth century, showing how the music of the Great American Songbook is particularly monumental in that its sophistication and conglomeration of different musical influences created a unique American musical framework. Part II discusses the framework of music copyright law, including theories of music copyright law, the evolution of the length of music copyright terms in the United States, and the history of the CTEA. Part III argues that Congress should not extend the duration of music copyright now that the CTEA is expired, and proposes a new public domain framework that would better protect cultural music history and the legacies of composers.

#### I. "TOO MARVELOUS FOR WORDS"<sup>18</sup>: A HISTORY OF THE GREAT AMERICAN SONGBOOK

The works that entered the public domain on January 1, 2019 consist of some of the most iconic and important American cultural creations,<sup>19</sup> most notably early songs of the Great American Songbook, a genre consisting of songs from the 1920s, 30s, 40s, and 50s.<sup>20</sup> Though copyright law applies to all music

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theater-review-holiday-inn.html. See also KENNETH AARON KANTER, *THE JEWS ON TIN PAN ALLEY: THE JEWISH CONTRIBUTION TO AMERICAN POPULAR MUSIC, 1830–1940* X (1982).

<sup>17</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>18</sup> JOHNNY MERCER & RICHARD WHITING, *TOO MARVELOUS FOR WORDS* (Harms, Inc. 1937).

<sup>19</sup> Liu, *The New Public Domain*, *supra* note 8, at 1397.

<sup>20</sup> THE GREAT AMERICAN SONGBOOK FOUNDATION, *What is the Songbook?*, <https://thesongbook.org/about/what-is-the-songbook/> (last visited Oct. 25, 2018).

genres, when discussing the effect of copyright protection on music, it is useful to examine the Great American Songbook, a group of works that is not only some of the first copyrighted music to enter the recently-opened public domain, but that also holds a significant place in American cultural history. Part A contextualizes the place of the Songbook in American history by discussing Tin Pan Alley, the popular music industry of the late nineteenth century—the precursor to the Great American Songbook.<sup>21</sup> Part B explains the significance of the Songbook, noting how its composers and lyricists created a unique and sophisticated American musical framework.

A. *The Revolution of the Popular Music Industry: Tin Pan Alley*

To better understand the Songbook's place in American musical history, it is helpful to look at the evolution of the popular song. The beginnings of the Great American Songbook can be traced to the music and entertainment industry of New York in the late nineteenth century, a time and place collectively known as Tin Pan Alley,<sup>22</sup> when the United States began to see overwhelming success in the popular music industry.<sup>23</sup> Tin Pan Alley refers not only to a geographical location in Manhattan filled with the sound of “tinny”<sup>24</sup> upright pianos, but also to the historical period, the style of music, and the publishing industry

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<sup>21</sup> KANTER, *supra* note 16, at 29.

<sup>22</sup> *Id.* Most of the early Songbook writers, such as Irving Berlin, Irving Caesar, and Jerome Kern, had backgrounds in vaudeville. *Id.* at 14.

<sup>23</sup> Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 608 (2006).

<sup>24</sup> There is no definitive origin of the name “Tin Pan Alley,” but a common story is that the name derived from the fact that songwriter and publisher Harry Von Tilzer covered the strings of his piano with pieces of paper, which made a tin-like sound when played. KANTER, *supra* note 16, at 24. Journalist Monroe Rosenfeld heard the sound of Von Tilzer's piano and entitled his article about the music industry “Tin Pan Alley,” though Von Tilzer claims that he himself coined the phrase. *Id.* Another version of the story omits the part about the paper-wrapped piano strings and says that Rosenfeld thought that the sound of upright pianos played at the same time in a concentrated area sounded like the “clashing of kitchenware.” David Sanjek, *They Work Hard for Their Money: The Business of Popular Music*, in AMERICAN POPULAR MUSIC: NEW APPROACHES TO THE TWENTIETH CENTURY 10 (Rachel Rubin & Jeffrey Melnick eds., 2001).

as a whole from 1890 to 1930.<sup>25</sup> This time period saw the height of ragtime, the player piano, and an ever-evolving, dominating music industry.

Beginning in the 1880s, powerful publishing firms employed song pluggers who created, distributed, and marketed new music<sup>26</sup> by performing new compositions for other performers, theater managers, and music sellers.<sup>27</sup> Tin Pan Alley represented the beginning of the modern music business and “the mass production of commercial culture in the form of the American popular song.”<sup>28</sup> For Tin Pan Alley songwriters, the primary motivation for writing was to sell songs, not to produce pieces that had particularly sophisticated messages; Tin Pan Alley songwriters were workers, not artists.<sup>29</sup> This mindset is best illustrated by looking at the humorous and often lengthy titles of Irving Berlin’s earliest novelty songs including “Bring Me A Ring In The Spring And I’ll Know That You Love Me” (December 1911), “Do Your Duty Doctor! (Oh, Oh, Oh, Oh, Doctor)” (August 1909), “Elevator Man Going Up, Going Up, Going Up!” (July 1912), “Herman Let’s Dance That Beautiful Waltz” (September 1910), and “Keep Away From The Fellow Who Owns An Automobile” (August 1912). These titles are far cries from Berlin’s later monumental songs of the Great American Songbook, such as “White Christmas,” “Be Careful, It’s My Heart,” and “How Deep is the Ocean?”<sup>30</sup>

Although more songs had been written and published in the 1890s than ever before, these songs were formulaic and unimpressive.<sup>31</sup> Songs written between 1892 and 1910 “somehow seem much older, as if they had emanated from a prehistoric period of pure Americana.”<sup>32</sup> The topics of Tin Pan Alley songs

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<sup>25</sup> Craig H. Roell, *The Development of Tin Pan Alley, in AMERICA’S MUSICAL PULSE: POPULAR MUSIC IN TWENTIETH-CENTURY SOCIETY* 113, 113 (Kenneth J. Bindas ed., 1992).

<sup>26</sup> *Id.* at 115.

<sup>27</sup> RUSSELL SANJEK, *PENNIES FROM HEAVEN: THE AMERICAN POPULAR MUSIC BUSINESS IN THE TWENTIETH CENTURY X* (1996). Irving Berlin started as a song plugger, as did George Gershwin, who became the youngest song plugger on Tin Pan Alley in May 1914 when he started working for the Jerome H. Remick Company. *Id.* at 35; KANTER, *supra* note 16, at 149.

<sup>28</sup> KEVIN PARKS, *MUSIC & COPYRIGHT IN AMERICA: TOWARD THE CELESTIAL JUKEBOX* 52 (2012).

<sup>29</sup> *Id.*

<sup>30</sup> CHARLES HAMM, *IRVING BERLIN: SONGS FROM THE MELTING POT: THE FORMATIVE YEARS, 1907–1914* 29, 226–28, 230 (1997).

<sup>31</sup> KANTER, *supra* note 16, at 20.

<sup>32</sup> YAGODA, *supra* note 11, at 32.

depicted changes in American life<sup>33</sup> and were often ripped from the headlines, especially during World War I.<sup>34</sup> Songs of this era had basic melodies, harmonies, and lyrics so that a family could easily play them on the piano in the living room parlor.<sup>35</sup> Overall, the music of this period was “catchy but trite beyond measure and could all be vamped on exactly the same chords, like some of the rock hits of the 1960s,”<sup>36</sup> distinct from the music that started to appear just a few years later.

### B. *The Great American Songbook: Tin Pan Alley Matures*

The generation of composers and lyricists after Tin Pan Alley is the generation that wrote the Great American Songbook. These Songbook writers, mostly born and raised in New York City, created sophisticated music and lyrics that combined different musical influences into a new American sound.<sup>37</sup>

Much of the Songbook, especially the songs that originated in Broadway musicals, has a jazz quality.<sup>38</sup> Jazz, an American genre, developed from a combination of African, European, and

<sup>33</sup> Roell, *supra* note 25, at 119.

<sup>34</sup> YAGODA, *supra* note 11, at 35. There were as many war songs as love songs during World War I. Jeffrey C. Livingston, “*Still Boy-Meets-Girl Stuff*”: *Popular Music and War*, in *AMERICA’S MUSICAL PULSE: POPULAR MUSIC IN TWENTIETH-CENTURY SOCIETY* 33, 33 (Kenneth J. Bindas ed., 1992). The biggest hit song of the war, written the day after the United States entered the war, was George M. Cohan’s “Over There,” which sold over one million records and two million copies of sheet music. *Id.* at 34. Composer Al Piantadosi wrote a song in 1915 entitled “I Didn’t Raise My Boy to Be a Soldier.” YAGODA, *supra* note 11, at 35. Charles K. Harris, a songwriter of this era known for his simple songs, composed the 1892 hit “After the Ball,” the first song to sell one million copies. Sanjek, *supra* note 24, at 11. In his 1906 book, *How to Write a Popular Song*, Harris advised songwriters to find song topics in newspapers. *Id.*

<sup>35</sup> YAGODA, *supra* note 11, at 33. In addition to popular songs with lyrics, piano ragtime music was extremely popular during this time period, and it was the first instrumental music to be as popular as vocally-based popular songs. David Joyner, *The Ragtime Controversy*, in *AMERICA’S MUSICAL PULSE: POPULAR MUSIC IN TWENTIETH-CENTURY SOCIETY* 239, 241 (Kenneth J. Bindas ed., 1992). Ragtime developed during this time period through the collaboration of pianists. Arewa, *supra* note 23, at 614. In 1911, Irving Berlin composed and published “Alexander’s Ragtime Band,” the most commercially successful ragtime song. Roell, *supra* note 25, at 115.

<sup>36</sup> WILFRID SHEED, *THE HOUSE THAT GEORGE BUILT: WITH A LITTLE HELP FROM IRVING, COLE, AND A CREW OF ABOUT FIFTY* 50–51 (2008).

<sup>37</sup> Jeffrey Melnick, *Tin Pan Alley and the Black-Jewish Nation*, in *AMERICAN POPULAR MUSIC: NEW APPROACHES TO THE TWENTIETH CENTURY* 31 (Rachel Rubin & Jeffrey Melnick eds., 2001).

<sup>38</sup> YAGODA, *supra* note 11, at 107 (noting that after World War II, Broadway musicals, such as those by Rodgers and Hammerstein, no longer contained jazz elements).



Caribbean traditions.<sup>39</sup> The music of Songbook composer George Gershwin was most notably inspired by a conglomeration of African-American traditions and Jewish music.<sup>40</sup> The Songbook writers' New York roots heavily shaped the Songbook, as much of the Songbook depicts New York as a multi-ethnic metropolis.<sup>41</sup> Not only were many of the Songbook writers Jewish, with the notable exceptions of Porter and Ellington, but many of the writers' fathers were cantors.<sup>42</sup> The streets of New York were an influential place where these writers assimilated into American culture as young boys; the streets "served as a first stop as young Jews sped away from the orthodoxy of family, culture, and religion."<sup>43</sup> "There was no other living music around except the music of the streets . . . ."<sup>44</sup>

The Songbook reached its highest point of achievement and sophistication in the late 1930s.<sup>45</sup> Many of the songs' lyrics included internal rhymes—rhymes that appear in the middle of lines, as opposed to at the end. In songwriting, internal rhymes are "surprising, sophisticated, and indicate a higher quality of writing."<sup>46</sup> The songs of the second quarter of the twentieth century were cosmopolitan, reminiscent of New York's "leisure-minded urbanites."<sup>47</sup> For example, Richard Rodgers & Lorenz Hart's 1925 song "Manhattan" includes examples of both internal rhymes and a descriptive depiction of New York. One verse of the song with its internal rhymes underlined is as follows:

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<sup>39</sup> Arewa, *supra* note 23, at 615.

<sup>40</sup> Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 315 (2006). Gershwin is said to have recounted that he heard Anton Rubinstein's *Melody in F* on a pianola outside a Harlem penny arcade and heard ragtime and jazz as he roller-skated in Harlem and Coney Island. Melnick, *supra* note 37, at 36.

<sup>41</sup> Melnick, *supra* note 37, at 33.

<sup>42</sup> Irving Berlin's father was a *chazan* (cantor) in his village in Siberia before his family came to America in 1893. KANTER, *supra* note 16, at 133. Harold Arlen's father was a cantor in the United States. SHEED, *supra* note 36, at 79–80.

<sup>43</sup> Melnick, *supra* note 37, at 35.

<sup>44</sup> SHEED, *supra* note 36, at 6.

<sup>45</sup> YAGODA, *supra* note 11, at 76.

<sup>46</sup> MOLLY-ANN LEIKIN, *HOW TO BE A HIT SONGWRITER: POLISHING AND MARKETING YOUR LYRICS AND MUSIC* 64 (3d ed. 2003).

<sup>47</sup> Melnick, *supra* note 37, at 33–34.

We'll have Manhattan,  
 The Bronx and Staten Island too.  
 It's lovely going through  
 The zoo.  
 It's very fancy  
 On old Delancey Street, you know.  
 The subway charms us so  
 When balmy breezes blow  
 To and fro.  
 And tell me what street  
 Compares with Mott Street in July?  
 Sweet pushcarts gently gliding by.  
 The great big city's a wondrous toy  
 Just made for a girl and boy.  
 We'll turn Manhattan  
 Into an isle of joy.<sup>48</sup>

Composer and lyricist Cole Porter was particularly known for his sophisticated lyrics that mixed high-brow and low-brow references.<sup>49</sup> This can be seen in a verse from his 1934 song “You’re the Top!,” in which he compares a person not only to a fancy bonnet and a sonnet, but also to a cartoon character:

You’re the top! You’re the Coliseum.  
 You’re the top! You’re the Louvre Museum.  
 You’re the melody from a symphony by Strauss.  
 You’re a Bendel bonnet,  
 A Shakespeare sonnet,  
 You’re Mickey Mouse!<sup>50</sup>

Songs of this time period were even intertextual, referring to other songs, writers, or even the song itself, as Ben Yagoda explains:

Ira Gershwin, in the verse to “They Can’t Take That Away [F]rom Me,” alludes to a Berlin classic: “The song is ended, but as the songwriter wrote, / ‘The Melody Lingers On.’” Rodgers and Hart’s funny 1939 “I Like to Recognize the Tune” protests against jazz combos that “kill the Arthur Schwartzes and the Glinkas.” (“Don’t be shtinkers,” pleads the next line.) In

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<sup>48</sup> *Manhattan*, LYRICS BY LORENZ HART, <http://www.lorenzhart.org/manhattanansng.htm> (last visited Oct. 25, 2018).

<sup>49</sup> *Why Cole Porter’s melodies and lyrics produce musical magic*, PBS NEWSHOUR (Jun. 21, 2016), <https://www.pbs.org/newshour/show/why-cole-porters-melodies-and-lyrics-produce-musical-magic>.

<sup>50</sup> *Lyrics to ‘You’re the Top!’ (1934) By Cole Porter*, READ WRITE THINK, [http://www.readwritethink.org/files/resources/lesson\\_images/lesson896/ColePorterLyrics.pdf](http://www.readwritethink.org/files/resources/lesson_images/lesson896/ColePorterLyrics.pdf) (last visited Oct. 25, 2018).

“You’re the Top,” Cole Porter pairs “Waldorf salad” with “Berlin ballad” and refers to “gifted humans like Vincent Youmans.” Porter’s immortal couplet “But how strange / The change from major to minor,” in “Ev’ry Time We Say Goodbye,” is sung just as the key to the song *changes from major to minor*.<sup>51</sup>

These sophisticated popular songs which form the Great American Songbook are significant as they are standards of the American music canon.<sup>52</sup> Songbook works are now jazz standards—pieces “that a professional musician may be expected to know.”<sup>53</sup> The songs were written in a way that makes them fungible and open to interpretation; they are “jazz-inflected in rhythm and harmonic possibilities.”<sup>54</sup> Though these songs were written decades ago, and originally sung by jazz and popular singers such as Ella Fitzgerald, Bing Crosby, and Frank Sinatra, they continue to be interpreted by later generations.<sup>55</sup> The Songbook’s simple yet sophisticated melodies, attractive harmonies, flexibility, “innate sense of structure, . . . rests, points of emphasis, and overall balance and taste”<sup>56</sup> show that its creators deserve to be remembered in American cultural history.

## II. “HOW LONG HAS THIS BEEN GOING ON?”<sup>57</sup>: AN INTRODUCTION TO MUSIC COPYRIGHT LAW

Congress first applied the Copyright Clause of the Constitution to musical works when it passed the Copyright Act of 1831.<sup>58</sup> Under the Copyright Clause, the framework of music copyright law is based on a theory of utilitarianism, balancing a creator’s right to protection with the public’s right to benefit from

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<sup>51</sup> YAGODA, *supra* note 11, at 77–78 (emphasis in original).

<sup>52</sup> Note, *Jazz Has Got Copyright Law and That Ain’t Good*, 118 HARV. L. REV. 1940, 1942 (2005).

<sup>53</sup> *Id.* (quoting THE NEW GROVE DICTIONARY OF JAZZ 1155 (Barry Kernfeld ed., 1994)).

<sup>54</sup> YAGODA, *supra* note 11, at 3.

<sup>55</sup> Ringo Starr, Paul McCartney, Cyndi Lauper, Willie Nelson, Linda Ronstadt, Rod Stewart, and Annie Lenox have all recorded albums featuring songs of the Great American Songbook. YAGODA, *supra* note 11, at 9; *see also* James Sullivan, *Who Killed the Great American Songbook?*, THE ATLANTIC (Jan. 23, 2015), <https://www.theatlantic.com/entertainment/archive/2015/01/the-great-american-songbook-isnt-dead/384764/>.

<sup>56</sup> YAGODA, *supra* note 11, at 3.

<sup>57</sup> GEORGE AND IRA GERSHWIN, HOW LONG HAS THIS BEEN GOING ON (Harms, Inc. 1927).

<sup>58</sup> Arewa, *supra* note 23, at 558.

the work.<sup>59</sup> Congress has continuously extended the duration of copyright protection for musical works, most recently by passing the CTEA in 1998, which enacted a twenty-year freeze on the public domain, making copyrighted pieces of the Great American Songbook copyrighted and controlled by composers' estates for a total of ninety-five years from the time of the original copyright year.<sup>60</sup>

#### A. *The Origin & Theory of Copyright Law*

Article I, Section 8, Clause 8 of the United States Constitution gives Congress the power to “promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>61</sup> According to this clause, copyright law's primary goal is to promote the arts and therefore benefit the public.<sup>62</sup>

In other words, copyright law in the United States is based on a theory of utilitarianism, as opposed to a theory that prioritizes an author's natural rights.<sup>63</sup> The utilitarian theory of copyright centers on social welfare;<sup>64</sup> its goal is to make artistic works as widely available to the public as possible.<sup>65</sup> This theory assumes that authors will invest time and effort into creating new works only if they have “ownership rights that will enable them to control and profit from their works' distribution to the public.”<sup>66</sup> The copyright owner is able to “exploit the work and obtain a return for his or her creative labor, thus providing an

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<sup>59</sup> MOSER & SLAY, *supra* note 3, at 7. The House Report on the 1909 Copyright Act stated:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.

*Id.* at 7 (quoting H.R. REP. NO. 2222 (1909) (emphasis omitted)).

<sup>60</sup> MOSER & SLAY, *supra* note 3, at 143.

<sup>61</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>62</sup> MOSER & SLAY, *supra* note 3, at 17.

<sup>63</sup> *Id.* at 7. See also Douglas M. Nevin, *No Business Like Show Business: Copyright Law, The Theatre Industry, and the Dilemma of Rewarding Collaboration*, 53 EMORY L.J. 1533, 1535–36 (2004).

<sup>64</sup> Deven R. Desai, *The Life and Death of Copyright*, 2011 WIS. L. REV. 219, 254–55 (2011).

<sup>65</sup> MOSER & SLAY, *supra* note 3, at 6.

<sup>66</sup> *Id.* at 6.

incentive to engage in the labor in the first place.”<sup>67</sup> That is, protection of an artist’s works is only a means to accomplish the primary goal of benefiting the public.<sup>68</sup> Conversely, a natural rights theory of copyright is a labor-based theory focused on an artist’s natural right to property that the artist created.<sup>69</sup> This theory “begins with the basic point that creation involves one’s labor”<sup>70</sup> and posits that an author has the right to be credited as the author while protecting “the integrity of his creation as an extension of his personality.”<sup>71</sup> The author, rewarded for contributing to society, has the right to receive compensation and control how his or her work is used.<sup>72</sup>

To achieve the Constitution’s utilitarian goal of making artistic works as widely available as possible, United States copyright law is a monopoly with limitations.<sup>73</sup> For example, works are copyrighted for only a limited amount of time before they enter the public domain where they are then free to be used without compensation or permission.<sup>74</sup> There are also limitations on the monopoly of copyright law even before works enter the public domain: copyright law applies to original works only,<sup>75</sup> copyright law protects expressions only and not ideas,<sup>76</sup> and

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<sup>67</sup> Liu, *Copyright and Time: A Proposal*, *supra* note 7, at 415.

<sup>68</sup> MOSER & SLAY, *supra* note 3, at 17. In the 1954 case *Mazer v. Stein*, the Supreme Court stated that “the encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors.” *Id.* at 17 (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (internal quotation marks omitted)).

<sup>69</sup> Desai, *supra* note 64, at 245–46. *See also* Nevin, *supra* note 63, at 1535–36.

<sup>70</sup> Desai, *supra* note 64, at 245.

<sup>71</sup> MOSER & SLAY, *supra* note 3, at 5. John Locke was an advocate of the “author’s right” theory, and believed that authors owned the labor of their bodies and the fruits of their labor. *Id.* at 5.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 6.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* *See also* *Jazz Has Got Copyright Law and That Ain’t Good*, *supra* note 52, at 1947. In *Baker v. Selden*, the Supreme Court held that an expression, but not an idea, can be copyrighted. *Id.* This holding was codified in Section 102(b) of the Copyright Act of 1976: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” *Id.* (quoting 17 U.S.C. § 102(b) (1976)).

copyright law permits some uses of copyrighted works without the author's consent through the fair use doctrine<sup>77</sup> and mechanical licenses.<sup>78</sup>

### B. *A Timeline of Music Copyright Law*

Congress has gradually increased the duration of copyright protection for music over the past few centuries. The government first exercised its power under the Constitution's Copyright Clause with the Copyright Act of 1790,<sup>79</sup> which protected maps, charts, and books for fourteen years, with a renewal period of an additional fourteen years.<sup>80</sup> This law also recognized that creators of intellectual property could transfer their work to others through intestacy or sale.<sup>81</sup>

Music first became protected by copyright laws with the passage of the Copyright Act of 1831<sup>82</sup> which extended the length of copyright protection to twenty-eight years with a renewal term of fourteen years.<sup>83</sup> Under the renewal term, the copyright owner was required to renew the copyright in the twenty-eighth year of

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<sup>77</sup> MOSER & SLAY, *supra* note 3, at 6. The fair use doctrine is a legal defense that allows someone to use a copyrighted work "in a reasonable manner without the owner's consent." *Id.* at 207. This doctrine is codified in Section 107 of the 1976 Act. *Id.* at 208. Courts look at the following factors to determine when the fair use doctrine applies:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. 17 U.S.C. § 107 (2012).

<sup>78</sup> MOSER & SLAY, *supra* note 3, at 77.

<sup>79</sup> PARKS, *supra* note 28, at 3.

<sup>80</sup> Christopher Buccafusco & Paul J. Heald, *Do Bad Things Happen When Works Enter The Public Domain?: Empirical Tests of Copyright Term Extension*, 28 BERKELEY TECH. L.J. 1, 6 (2013). The Copyright Act of 1790 was based on England's Statute of Anne, passed by Parliament in 1710. MOSER & SLAY, *supra* note 3, at 15, 17. The Statute of Anne applied to the printing and selling of books and allowed for a fourteen-year term of copyright protection that was renewable for another fourteen years if the author was still alive after the initial term. *Id.* at 16. Therefore, even if the author transferred the copyright to a publisher, after the first fourteen-year term, the author would have an opportunity to regain the rights to the work. *Id.*

<sup>81</sup> PARKS, *supra* note 28, at 3.

<sup>82</sup> Arewa, *supra* note 23, at 558.

<sup>83</sup> Buccafusco & Heald, *supra* note 80, at 6.

protection by filing an application with the Copyright Office, otherwise the piece would enter the public domain.<sup>84</sup> The renewal right passed to the author's widow or children if the author was deceased.<sup>85</sup>

The Copyright Act of 1909 retained the twenty-eight-year period of initial protection of the 1831 Act but extended the renewal period from fourteen to twenty-eight years, increasing the total maximum duration of copyright protection to fifty-six years.<sup>86</sup> The 1909 Act was the first copyright law that applied to recorded music, and it gave composers a small royalty from the sale of piano rolls or discs, in response to the developing musical technology of the time.<sup>87</sup>

Starting in 1962, Congress steadily increased the length of music copyright a total of nine times within twelve years.<sup>88</sup> Until 1976, the duration of copyright was based on the publishing date of the work.<sup>89</sup> However, the 1976 Copyright Act changed the copyright scheme so that copyright duration coincided with the lifetime of an author.<sup>90</sup> Under this Act, a work was protected for the length of the author's lifetime, plus an additional fifty years.<sup>91</sup> Congress extended the duration of copyright for several reasons. Life expectancy had increased since the 1909 Act's passage, and so the maximum duration of fifty-six years under the 1909 Act did not cover the duration of an author's lifetime,<sup>92</sup> furthermore, foreign countries based their copyright duration on an author's lifetime plus a duration after death.<sup>93</sup> The renewal requirement of the 1909 Act was also deemed unworkable because authors could unfairly lose rights to their works due to an inadvertent failure to renew their registrations.<sup>94</sup> Under the new lifetime approach of the 1976 Act, all of an author's works

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<sup>84</sup> Robert Spoo, *Three Myths for Aging Copyrights: Tithonus, Dorian Gray, Ulysses*, 31 CARDOZO ARTS & ENT. L.J. 77, 83 (2012).

<sup>85</sup> MOSER & SLAY, *supra* note 3, at 17.

<sup>86</sup> *Id.* at 18.

<sup>87</sup> Roell, *supra* note 25, at 118.

<sup>88</sup> Liu, *Copyright and Time: A Proposal*, *supra* note 7, at 416–17.

<sup>89</sup> U.S. COPYRIGHT OFFICE, CIRCULAR 15A.0811, DURATION OF COPYRIGHT 2 (2011), <https://www.copyright.gov/circs/circ15a.pdf> [hereinafter DURATION OF COPYRIGHT].

<sup>90</sup> MOSER & SLAY, *supra* note 3, at 19.

<sup>91</sup> *Id.* Under this Act, copyright automatically applies to any work that is fixed in a tangible form, even without registration. *Id.* The Act specifies broad categories that are protected, including musical works and sound recordings. *Id.*

<sup>92</sup> *Id.* at 139.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

would enter the public domain at the same time.<sup>95</sup> However, the 1976 Act did not apply this lifetime-based copyright scheme to music already protected by copyright before January 1, 1978.<sup>96</sup> Instead, the 1976 Act increased the duration of the renewal term for pre-1976 music from twenty-eight to forty-seven years, in addition to the initial copyright period of twenty-eight years, meaning that a piece copyrighted before 1976 could be protected for a total of seventy-five years.<sup>97</sup>

C. *The Sonny Bono Copyright Term Extension Act (“CTEA”) of 1998*

The Sonny Bono Copyright Term Extension Act of 1998 (“CTEA”) added twenty years to the guidelines created by the 1976 Copyright Act, retroactively extending the duration of copyright.<sup>98</sup> Under the CTEA, the copyrights of works created in or after 1978 extend for the lifetime of the author, plus seventy years, as opposed to the fifty-year extension under the 1976 Act.<sup>99</sup> Works created before 1978, such as those of the Great American Songbook, now have a twenty-eight-year initial period plus a sixty-seven-year renewal term, for a total of ninety-five years of protection.<sup>100</sup>

The CTEA was the result of lobbying by powerful estates, most notably the Disney Corporation and the Gershwin family, in the face of Disney’s Mickey Mouse and George Gershwin’s orchestral piece, *Rhapsody in Blue*, being slated to enter the public domain in the late 1990s.<sup>101</sup> Academics heavily attacked the CTEA, arguing that revenue from twenty additional years of copyright was “unlikely to lead to any appreciable increase in creative effort or activity.”<sup>102</sup> Furthermore, since this extension applied to music written by composers who had already died, the argument that copyright protection was required to incentivize authors to create future works could not justify extending the

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 19.

<sup>97</sup> DURATION OF COPYRIGHT, *supra* note 89, at 2.

<sup>98</sup> MOSER & SLAY, *supra* note 3, at 143.

<sup>99</sup> *Id.* at 140.

<sup>100</sup> *Id.* at 143.

<sup>101</sup> See Arewa, *Copyright on Catfish Row*, *supra* note 40, at 284–85. Mickey Mouse, copyrighted in 1923, was set to expire in 1998 after a twenty-eight-year initial term and a forty-seven-year renewal period. *Rhapsody in Blue*, copyrighted in 1924, was set to expire in 1999. *See id.*

<sup>102</sup> Liu, *Copyright and Time: A Proposal*, *supra* note 7, at 417.



copyrights of already-existing works.<sup>103</sup> One scholar has written that in passing the CTEA, Congress incorrectly relied on the lazy and unsupported argument that “bad things will happen to the work when it falls into the public domain.”<sup>104</sup>

Though the constitutionality of the CTEA under the Constitution's Limited Times clause was challenged in *Eldred v. Ashcroft*,<sup>105</sup> the Supreme Court upheld the CTEA as constitutional, finding that Congress has the authority to determine how long copyright should last.<sup>106</sup> Justice Ginsburg, writing for a seven-member majority, noted that the Court could not “second-guess congressional determinations and policy judgments,”<sup>107</sup> adding that Congress has the authority to decide how to balance the Copyright Clause's goals.<sup>108</sup> Justice Ginsburg discussed Congress' reasoning for the CTEA, including international concerns, and demographic, economic, and technological changes that warranted a copyright extension.<sup>109</sup> Members of Congress argued that due to increasing lifespans and an increase in the age of a parent when his or her child is born, an extended copyright term was necessary for artists to secure the right to profit from their works both for themselves during their lifetimes and for their heirs.<sup>110</sup> Additionally, members of Congress argued that because the European Union in 1995 had extended the copyright term to seventy years beyond the lifetime of an author, the United States would lose millions of dollars in export revenues if it did not also extend its own copyright term because the European Union would not need to provide copyright protection to the United States.<sup>111</sup> Members of Congress also argued that the increasing “commercial life of copyrighted works resulting from the rapid growth in communications media” also required a longer copyright term.<sup>112</sup> The *Eldred* Court further cited the argument in the CTEA's House Report that extending

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<sup>103</sup> *Id.* at 417–18. See also Paul J. Heald, *How Copyright Keeps Works Disappeared*, 11 J. EMPIRICAL LEGAL STUD. 829, 831 (2014).

<sup>104</sup> Heald, *supra* note 103, at 831.

<sup>105</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003). The petitioners also challenged the CTEA under the First Amendment, but a First Amendment discussion is outside the scope of this Note. *Id.* at 193–94.

<sup>106</sup> MOSER & SLAY, *supra* note 3, at 144. See also *Eldred*, 537 U.S. at 194.

<sup>107</sup> *Eldred*, 537 U.S. at 208.

<sup>108</sup> *Id.* at 212–13.

<sup>109</sup> *Id.* at 206–07.

<sup>110</sup> *Id.* at 207 n.14.

<sup>111</sup> *Id.* at 205–07; see H.R. REP. NO. 105–452, at 4 (1998).

<sup>112</sup> *Eldred*, 537 U.S. at 207 n.14.

the copyright term would give copyright owners the incentive to “restore older works and further disseminate them to the public.”<sup>113</sup> The Court concluded that the CTEA’s twenty-year extension was still considered a “limited Time[]” under Congress’ authority to carry out the Constitution’s Copyright Clause.<sup>114</sup>

### III. “IT’S EASY TO REMEMBER”<sup>115</sup>: A PROPOSAL FOR PROTECTING A COMPOSER’S PLACE IN CULTURAL HISTORY

Under the CTEA, estates of Songbook composers maintain broad control over compositions for ninety-five years after a work is initially copyrighted,<sup>116</sup> during which time the estates earn royalties from the use of the compositions in recordings, live performances, radio or web broadcasts, sheet music, films, television, and advertising.<sup>117</sup>

Though Congress should not extend the duration of music copyright now that the CTEA is expired because the utilitarian Copyright Clause calls for the expiration of music copyrights in order to promote progress of the arts, the legacies of creators still deserve to be protected and remembered. Therefore, when a composer’s works enter the public domain and can no longer be artistically controlled, the legacies of composers should be protected through two requirements. First, a user of a public domain work should be required to give credit to the piece’s composer. Second, certain users of public domain works should be required to donate to cultural organizations a small portion of their royalties received from their use of public domain works.

Part A explains this proposal in detail, describing the attribution requirement and the royalty donation requirement. Part B argues that Congress should not extend the duration of music copyright after the expiration of the CTEA because any further extension would be at odds with the Copyright Clause. Though there may always be arguments to make in favor of extensions, Congress should no longer push off the entry of works into the public domain. Part C argues that a robust public

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<sup>113</sup> *Id.* at 207.

<sup>114</sup> *Id.* at 209.

<sup>115</sup> RICHARD RODGERS & LORENZ HART, *IT’S EASY TO REMEMBER* (Famous Music Corp. 1935).

<sup>116</sup> Arewa, *Copyright on Catfish Row*, *supra* note 40, at 285; *see also* MOSER & SLAY, *supra* note 3, at 143.

<sup>117</sup> Mike Boehm, *A Rare Rift in George and Ira Gershwin's Harmony*, L.A. TIMES (Nov. 1, 2009), <http://www.latimes.com/entertainment/arts/la-ca-gershwin1-2009nov01-story.html>.

domain is necessary, and that a moral responsibility to protect composers' legacies requires the proposed public domain safeguards. This section also addresses the counterargument that protection of composers' legacies should take the form of a public domain scheme in which a composer's estate would continue to have the right to reject certain uses of a public domain work.

A. *A New Public Domain with Safeguards Would Help Protect the Legacies of Creators Whose Works Can No Longer Be Protected by Copyrights*

Although copyrights can constitutionally last for only a limited time, composers should have the right to be remembered as the authors of works available to the public. Though United States copyright law is based on a public-focused utilitarian theory, and not a creator-focused theory that prioritizes natural rights or labor rights,<sup>118</sup> it is still difficult to morally accept the fact that once a work enters the public domain, the work's creator will no longer have rights to a work that he or she created.<sup>119</sup> The framework and implementation of the public domain should be changed to better protect a creator's legacy and place in cultural history when the creator no longer has exclusive rights.

Safeguards in the public domain should facilitate a remembrance of composers for their skills and labor required to create musical works. Though it is incorrect to view musical production as a completely autonomous and independent endeavor that is therefore deserving of stringent and prolonged copyright protection,<sup>120</sup> there should still be an attempt to protect a composer's legacy. In the case of the Songbook, Songbook composers combined "many different regional, racial, and class-identified sounds into a distinct American song form."<sup>121</sup> For example, "Gershwin found inspiration in African American blues and jazz styles, Tin Pan Alley idioms, and the languages and forms of European art music."<sup>122</sup> Though his studies with Russian composer Joseph Schillinger can be heard in *Porgy and*

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<sup>118</sup> MOSER & SLAY, *supra* note 3, at 7.

<sup>119</sup> *See id.* at 5.

<sup>120</sup> Arewa, *supra* note 23, at 551.

<sup>121</sup> Melnick, *supra* note 37, at 37.

<sup>122</sup> Arewa, *Copyright on Catfish Row*, *supra* note 40, at 305 (quoting Larry Starr, *Ives, Gershwin, and Copland: Reflections on the Strange History of American Art Music*, 12 AM. MUSIC 167, 170-171 (1994)).

*Bess*, “I Got Rhythm,” and *Cuban Overture*,<sup>123</sup> it was Gershwin himself who actually took musical influences and turned them into a new conglomeration. At least sometimes, “[m]usic is not produced by whole groups, but by one genius at a time.”<sup>124</sup> Therefore, Congress should implement the following changes to the public domain in order to protect composers’ legacies.

1. Public domain users should be required to nominally credit authors and provide a disclosure

Currently, there is no requirement to include an attribution to the initial creator when using a public domain work.<sup>125</sup> Congress should enact a law requiring a user of a public domain work to credit the original composer of the song in situations where the user would be liable for copyright infringement had the work still been copyrighted. This means that if a director were to use a public domain song in a film, the director would not have to get permission from an estate to use the work but would have to name the composer in the film’s credits. Similarly, if a current musician were to sample a piece of a public domain song in a newly copyrighted piece of work by including fragments of the older song, the new song’s credits would be required to include the composer of the original piece. A jazz musician using the chorus of a Songbook song as the basis for a ten-minute improvised solo on a recording would be able to receive his or her own royalties but would need to credit the composer of the original song.

Any practical problems posed by an attribution requirement are insubstantial. The Supreme Court’s reasoning in *Dastar Corporation v. Twentieth Century Fox Film Corporation* makes an attribution requirement more complicated than necessary. There, the Court held that attribution was not required due to practical problems.<sup>126</sup> The case involved a company that modified tapes of a public domain television series before manufacturing and selling the series as its own product without attributing the original series.<sup>127</sup> Justice Scalia, in writing for the Court,

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<sup>123</sup> *Id.* at 307.

<sup>124</sup> SHEED, *supra* note 36, at 8.

<sup>125</sup> Rich Stim, *Public Domain Trouble Spots*, COPYRIGHT & FAIR USE: STANFORD UNIVERSITY LIBRARIES, <https://fairuse.stanford.edu/overview/public-domain/trouble-spots/> (last visited Oct. 25, 2018).

<sup>126</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 35–36 (2003).

<sup>127</sup> *Id.* at 26–7.

analyzed the meaning of the Lanham Act, a trademark act that creates a remedy against a person who uses “a false designation of origin,”<sup>128</sup> and concluded that attribution was not required because it would sometimes be too difficult to find the origin of a work.<sup>129</sup> Scalia wrote:

A video of the MGM film *Carmen Jones*, after its copyright has expired, would presumably require attribution not just to MGM, but to Oscar Hammerstein II (who wrote the musical on which the film was based), to Georges Bizet (who wrote the opera on which the musical was based), and to Prosper Merimee (who wrote the novel on which the opera was based).<sup>130</sup>

Giving credit to previously-existing works is not as complicated as the Court makes it seem. There are many times when the public domain work on which a modern work is based is obvious. In his opinion, Scalia wrote that an attribution requirement would require a “search for the source of the Nile and all its tributaries.”<sup>131</sup> However, a requirement to give nominal credit to the creator of a public domain work should require the current artist to make a best-effort attempt to determine the most appropriate creator to whom credit should be given. In *Dastar*, the company clearly copied directly from an existing television show—it was not difficult to figure out the origin of the work.<sup>132</sup> Although attributing a piece to previous creators may require attributions to more than one person, in many instances this requirement would involve credit to only a single person. That is, Elvis Presley would have simply needed to credit George Poulton, the composer of “Aura Lee,” the melody of which Presley took and recopyrighted for his own benefit.

An attribution to the initial creator would help alleviate the concern that uncontrolled uses of public domain works will lead to inappropriate versions of the works that will in turn “affect the public’s judgments about the works’ quality and meaning and therefore their underlying value.”<sup>133</sup> One scholar, Joseph P. Liu, who has argued the importance of the audience’s “interest in the

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<sup>128</sup> *Id.* at 29 (quoting 15 U.S.C. § 1125(a) (2000)).

<sup>129</sup> *Id.* at 35–36.

<sup>130</sup> *Id.* at 35.

<sup>131</sup> *Id.* at 36.

<sup>132</sup> *See id.* at 26–27 (describing how *Dastar* created the video set *Campaigns* by copying tapes of the original television series *Crusade in Europe* and then editing these videos).

<sup>133</sup> Buccafusco & Heald, *supra* note 80, at 4.

stability of the meaning of cultural artifacts,”<sup>134</sup> has suggested that a disclaimer would be an appropriate way to address confusion of consumers “without limiting the ability of a third party to use the underlying work.”<sup>135</sup> Though Liu does not elaborate on what this disclaimer would look like, it would be appropriate for artists using a public domain piece to use words such as “based on a work,” “in the style of,” or “inspired by” to signal that the original creator may not have intended that the piece be performed in the way in which it is currently being performed. For example, if someone turned a Gershwin piece into a recopyrighted techno song, the credit would read “based on a work by George and Ira Gershwin.” In the case of an interpretation of a work that is especially at odds with the initial work, such as the regional production of *The Music Man* discussed below,<sup>136</sup> the user should be required to write a lengthier disclaimer explaining that the interpretation does not reflect the original creator’s intentions. Though one can argue that this disclaimer would not change the public’s judgment of a public domain piece if the interpretation is especially “inappropriate,” it is a safeguard that would allow artists to freely use public domain pieces while informing the public that the modern artist has added his or her own interpretation to the piece.

2. A small portion of royalties received from recopyrighted public domain works should be donated to cultural organizations that will preserve the legacies of the initial works

Congress should require public domain users who recopyright public domain works to donate to the original composers’ estates and to cultural organizations a small portion of the royalties received from recopyrighted uses of public domain works, in order to preserve the original composers’ legacies in cultural history. Though Songbook estates would no longer have input on the use of public domain works, estates would exist to administer money received from royalties of recopyrighted public domain works. Strict guidelines would prevent estates from

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<sup>134</sup> Liu, *Copyright and Time: A Proposal*, *supra* note 7, at 442.

<sup>135</sup> Liu, *The New Public Domain*, *supra* note 8, at 1433.

<sup>136</sup> See *infra* Part III.C.1.

using this money for personal use; estates would exist only as a vehicle to preserve cultural history and promote progress of the arts.

One scholarly proposal has suggested that the Copyright Office and the Library of Congress “facilitat[e] awareness and use of new public domain works” by publishing a list that details at what time specific works will pass into the public domain.<sup>137</sup> However, this proposal only ensures that the public know *when* works enter the public domain, and does not consider *how to protect* the cultural legacies of works in the public domain.

Requiring public domain users to donate royalties to estates and cultural institutions can be critiqued as being at odds with the idea of a true public domain free from any barriers. However, under this proposal, an artist would not have to secure a license or pay royalties in order to *use* a public domain work. Further, if an artist makes money from a recopyrighted interpretation of a public domain work, this means that the public domain work is still culturally valuable. Therefore, the artist should have a moral obligation to donate a small portion of his or her earnings to ensure that the cultural legacy of the initial artist who created this valuable piece is preserved.

In the case of the Great American Songbook, money received by the estates of Songbook composers should be donated to various organizations dedicated to teaching the public about the Songbook. This is already somewhat in place in the case of a Gershwin estate, where the Leonore S. Gershwin Trust for the Benefit of the Library of Congress, a trust that handles the copyrights of Ira Gershwin, gives the money it receives to the Library of Congress in support of the arts.<sup>138</sup> Another possible organization to which royalties can be donated is the Great American Songbook Foundation, “a 501(c)(3) non-profit organization dedicated to the preservation and promotion of the music of the Great American Songbook.”<sup>139</sup> Michael Feinstein, famed Songbook musician and former secretary to Ira Gershwin,

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<sup>137</sup> Liu, *The New Public Domain*, *supra* note 8, at 1453, 1455–56.

<sup>138</sup> Arewa, *supra* note 23, at 318–19. Other trusts that control the Gershwins’ estate include the George Gershwin Family Trust, which handles rights of George Gershwin’s works, and the Leonore S. Gershwin Trust for the Benefit of the Ira and Leonore Gershwin Designated Philanthropic Fund. *Id.* at 318–19

<sup>139</sup> *About the Songbook Foundation*, THE GREAT AMERICAN SONGBOOK FOUNDATION, <https://thecenterpresents.org/about/great-american-songbook-foundation/> (last visited Oct. 25, 2017).

is the Artistic Director of the Foundation.<sup>140</sup> The Foundation's mission is to "preserve America's rich musical legacy through the Songbook Archives & Library," which it accomplishes through "rotating public exhibits that share the history, music, and culture of the Songbook."<sup>141</sup> Previous displays at the Foundation's museum have included the piano roll from *Rhapsody in Blue* and an exhibit on Ella Fitzgerald's interpretations of works by Songbook composers.<sup>142</sup> Through the Foundation's publicly-available online archive and in-person exhibits, visitors can learn about the history and cultural legacy of the Songbook. Royalties received from recopyrighted public domain works would further the work of the Songbook Foundation and similar cultural institutions.

*B. "Something's Gotta Give"<sup>143</sup>: The Constitution's Copyright Clause Does Not Favor Future Copyright Extensions*

The Copyright Clause of the Constitution includes just two requirements that Congress must follow when creating legislation to secure a creator's exclusive right to a work: copyright protections must last for "limited Times" and copyright protections must "promote the Progress of Science and useful Arts."<sup>144</sup> Proponents of copyright extensions argue that the demographic, economic, and technological changes noted in *Eldred*<sup>145</sup> make copyright extensions necessary. Other proponents of copyright extensions may argue that a composer's works will be debased if users have the absolute freedom to use public domain works in any way that they want.<sup>146</sup> However, further copyright extensions would not satisfy either of the two constitutional requirements.

First, continuous copyright extensions, in the aggregate, act as unconstitutional perpetual protections at odds with the "limited Times" requirement. Because there may always be issues that can be addressed through copyright extensions, finding a time to end any further copyright extensions may never

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Songbook Exhibit Gallery*, THE GREAT AMERICAN SONGBOOK FOUNDATION, <http://thecenterfortheperformingarts.org/Great-American-Songbook-Initiative/Education/Songbook-Gallery> (last visited Oct. 25, 2017).

<sup>143</sup> JOHNNY MERCER, *SOMETHING'S GOTTA GIVE* (Robbins Music Corp. 1954).

<sup>144</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>145</sup> *See supra* Part II.C.

<sup>146</sup> Buccafusco & Heald, *supra* note 80, at 4; *see also infra* Part III.C.1.



be easy. Congress and the courts should no longer look at cultural or economic issues, such as the lifespan argument that Congress used to support both the 1909 Act and the CTEA, as valid reasons to extend copyright.

Second, current copyright law is strict and does not promote progress of the arts. Therefore, artistic progress would only be further stunted by another copyright extension. Works must be easily accessible to promote the arts—an impossibility when heirs maintain strict control. Further, progress of the Great American Songbook would particularly suffer from extended copyrights because the Songbook has become synonymous with jazz,<sup>147</sup> a genre characterized by the improvisation of new melodies on previously-created compositions.

1. Future copyright extensions would be at odds with the Copyright Clause's "limited Times" requirement

Although the Supreme Court in *Eldred v. Ashcroft* held that the CTEA does not violate the "limited Times" requirement of the Copyright Clause,<sup>148</sup> the Court's reasoning makes the constitutionality of any future copyright extensions doubtful. In *Eldred*, the Court rejected the view that the CTEA and earlier copyright acts created perpetual copyrights.<sup>149</sup> The Court stated that "[n]othing before this Court warrants construction of the CTEA's 20-year term extension as a congressional attempt to evade or override the 'limited Times' constraint,"<sup>150</sup> pointing to international concerns, as well as to demographic, economic, technological, and lifespan changes that warranted a copyright extension, in addition to the argument that a copyright extension would give copyright owners the incentive to disseminate works to the public.<sup>151</sup> However, any extension beyond these twenty years would, in effect, act as a perpetual copyright. Scholars Arlen W. Langvardt and Kyle T. Langvardt have argued that without a court-ordered guideline of how far an extension can extend and still be considered a "limited time," courts should not

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<sup>147</sup> *What is the Songbook?* THE GREAT AMERICAN SONGBOOK FOUNDATION, <https://thesongbook.org/> (last visited Sept. 21, 2018).

<sup>148</sup> See *supra* Part II.C.

<sup>149</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003). Justice Ginsburg agreed with the Court of Appeals' decision, writing, "[a]s the Court of Appeals observed, a regime of perpetual copyrights 'clearly is not the situation before us.'" *Id.* at 209 (quoting *Eldred v. Reno*, 239 F.3d 372, 379 (D.C. Cir. 2001)).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 206–07, 207 n.14.

approve any other extension “on grounds that could be generalized to any future extension” for fear of giving “tacit approval to a hypothetical indefinite series of term extensions, and thus a perpetual working copyright.”<sup>152</sup> Even though copyright extensions may not be explicitly characterized as perpetual or infinite, repeatedly extending the copyright duration to prevent works from entering the public domain is at odds with the Copyright Clause because it amounts to the functional equivalent of a perpetual or infinite copyright.

In order to comply with the constitutional requirement that copyrights last for only a limited time, there must be a point at which the duration of copyright can no longer be extended. Concerns surrounding the expiration of works’ copyrights can be alleviated by adjusting the public domain, not by perpetually extending the duration of copyright.

## 2. Future copyright extensions would not promote progress of the arts

Future potential copyright extensions would also violate the constitutional goal of promoting progress of the arts. Unlike a typical case of inheritance in which, for example, heirs inherit a piece of jewelry without considering how that inheritance affects the public’s rights, the inheritance of musical works requires a balance between the right to control a work during a copyright term, and the public’s need to access that work.<sup>153</sup> Therefore, it is important to focus on how copyright frameworks will affect current artists. First, further copyright extensions would prolong artists’ fear of being influenced by previous works and then being held liable for copyright infringement. Second, easily accessible musical works are essential in order to promote progress of the arts. Third, further copyright extensions would particularly

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<sup>152</sup> Arlen W. Langvardt & Kyle T. Langvardt, *Unwise or Unconstitutional?: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit*, 5 MINN. J. L. SCI. & TECH. 193, 286 (2004).

<sup>153</sup> Andrew Gilden, *Life, Death, Public Domain*, 22 GEO. MASON L. REV. 13, 19 (2014). Gilden points to the 1975 Supreme Court case *Twentieth Century Music Corp v. Aiken* in which the Court stated that “the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.” *Id.* at 20 (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

inhibit the progress of the Great American Songbook, now synonymous with jazz, a genre in which musicians are expected to use previous compositions as jumping-off points for improvised solos.

*a. Fear of Copyright Infringement Inhibits Progress of the Arts*

Copyright law dissuades modern artists from promoting progress of the arts due to a stringent and protective framework that holds artists liable for infringement *even without* direct evidence or an intent to infringe. Just as the “need to consider asking for permission can have an impact on the creative impulse,”<sup>154</sup> so can the fear of liability for copyright infringement. Therefore, any future copyright extension beyond the ninety-five-year period for Songbook works would only further inhibit progress of the arts.

Because copyright law protects the copyright owner’s interest in a work, the burdens that a copyright owner must meet to prove copyright infringement are low. A copyright owner has the exclusive right to create derivative works,<sup>155</sup> and can sue for copyright infringement of a validly copyrighted work registered with the Copyright Office.<sup>156</sup> Registration of a work creates a presumption that the work is valid and original; the owner must show that the defendant played a part in unauthorized copying of the work.<sup>157</sup> However, though actual copying can be proved by direct evidence,<sup>158</sup> actual copying can also be inferred if the defendant had access to the plaintiff’s work and the two works are “substantially similar.”<sup>159</sup> Access itself can be inferred if the defendant simply heard the work on the radio or at a concert, or if the court can infer that the defendant had access through public dissemination of the work.<sup>160</sup> Though substantial similarity may require a plaintiff to show “probative similarity” through expert dissection and testimony, substantial similarity can also be inferred if the works are “strikingly similar.”<sup>161</sup> After

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<sup>154</sup> Liu, *The New Public Domain*, *supra* note 8, at 1418.

<sup>155</sup> Arewa, *supra* note 23, at 572.

<sup>156</sup> William R. Coulson, *They’re Playing Our Song! The Promise and the Perils of Music Copyright Litigation*, 13 J. MARSHALL REV. INTELL. PROP. L. 555, 559–60 (2014).

<sup>157</sup> *Id.* at 560.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 560–61.

<sup>160</sup> *Id.* at 561.

<sup>161</sup> *Id.*

establishing actual copying, a plaintiff must prove to an “ordinary lay hearer” that there was “improper or unlawful appropriation.”<sup>162</sup> A defendant does not need to have intentionally copied an existing work in order to be liable for copyright infringement.<sup>163</sup> This entire framework inhibits artists from showing the influence of any already-existing music in their own new works, and is therefore a barrier to progress of the arts.

*b. Works Must Be Easily Accessible in Order to Promote the Arts*

Progress of the arts can be better achieved if the public can easily access musical pieces. While Congress passed the CTEA with reliance on the argument that extending the copyright term would give copyright owners “the incentive to restore older works and further disseminate them to the public,”<sup>164</sup> a recent study found that copyrighted works disappear from public view more often than uncopyrighted works, and only reappear for the public once in the public domain.<sup>165</sup>

Technological advancements since the passage of the CTEA will further the public’s ability to access works in the public domain because pieces can now be distributed digitally at little or no cost.<sup>166</sup> This makes it feasible to even distribute works for which there is minimal demand, meaning that obscure songs will find an audience, ensuring that the public domain will include an increasingly wide range of pieces.<sup>167</sup>

Though one can argue that technological developments that allow consumers to readily use and distort works are problematic because of the potential to create something at odds with the intent of the author, the positives of the technology outweigh the negatives since the technology allows songs to reach more people.<sup>168</sup> Whereas copyright extensions “impose substantial costs on the public by depriving it of freer access to copyrighted works”<sup>169</sup> and lead to a decrease in the number of total works

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<sup>162</sup> *Id.*; see also *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

<sup>163</sup> Coulson, *supra* note 156, at 562. In *Bright Tunes Music Corp. v. Harrisongs Music*, the court found that George Harrison unintentionally copied the Chiffons’ song “He’s So Fine” in his song “My Sweet Lord.” *Id.*

<sup>164</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 207 (2003).

<sup>165</sup> Heald, *supra* note 103, at 830.

<sup>166</sup> Liu, *The New Public Domain*, *supra* note 8, at 1398.

<sup>167</sup> *Id.* at 1412.

<sup>168</sup> *Id.* at 1398.

<sup>169</sup> Liu, *Copyright and Time: A Proposal*, *supra* note 7, at 418.

since it is too costly to draw upon prior works,<sup>170</sup> technological changes have and will continue to increase the cultural interest in adaptations of works, thereby promoting the arts.<sup>171</sup>

c. *Copyright Extensions Would Particularly Stunt the Progress of the Great American Songbook—Songs that Now Form the Jazz Canon*

It is especially difficult to promote the progress of the Great American Songbook when these songs have become standards of jazz, a genre in which musicians improvise solos based on existing compositions. These solos can be extensive: saxophonist John Coltrane used Gershwin's melody of "Summertime" for just sixty-four seconds of his eleven-minute, thirty-one-second recording of the song.<sup>172</sup> However, copyright law recognizes only the original composer as the sole owner of the composition.<sup>173</sup> Under a compulsory licensing scheme for copyright compositions, jazz musicians can use an existing song without receiving permission from the copyright owner, so long as the song has "been previously licensed to someone else for mechanical reproduction and the musician pays a statutory royalty."<sup>174</sup> However, this scheme does not protect the jazz musician's improvisational additions.<sup>175</sup> Though a jazz musician who wants to copyright an addition to a song can attempt to get permission from the copyright owner to receive a derivative work copyright, jazz musicians often rely only on the compulsory licensing scheme, meaning that a publishing company can transcribe and publish a jazz musician's solo without paying the soloist who labored to create a brand-new improvised solo.<sup>176</sup>

One can use the Romantic author theory<sup>177</sup> to argue that because the Songbook is still highly valuable and relevant to current jazz musicians, Songbook estates should continue to hold exclusive rights to these songs as a reward for the composer's ability to create timeless works.<sup>178</sup> The Romantic author theory

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<sup>170</sup> *Id.* at 430.

<sup>171</sup> Liu, *The New Public Domain*, *supra* note 8, at 1413.

<sup>172</sup> *Jazz Has Got Copyright Law and That Ain't Good*, *supra* note 52, at 1944.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 1945.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 1945–46.

<sup>177</sup> Arewa, *supra* note 23, at 551.

<sup>178</sup> See YAGODA, *supra* note 11, at 2–3 (discussing the timelessness of the Great American Songbook).

views musical production as “autonomous, independent and in some cases even reflecting genius.”<sup>179</sup> However, this is at odds with the constitutional goal of promoting progress of the arts because although a composer may create a piece whose value and relevance remain for years after its composition, the United States’ theory of copyright law requires a consideration of the public’s interest.<sup>180</sup> Furthermore, scholars have argued that “the further we move from the original creative act, the more likely it is that the continuing success of the work is due to factors unrelated to the original creative labor.”<sup>181</sup> For example, one must wonder if Berlin’s “White Christmas” would be as iconic as it is today had Bing Crosby not been the singer who first introduced the song on what remains the best-selling record of all time.<sup>182</sup> It is not only the composer who creates the legacy of the piece, but also the performer, orchestrator, and arranger. Instead of composers maintaining exclusive rights, remembrance of a composer’s skill or “genius” should be achieved through a change in the public domain and private organizations.

C. *“As Time Goes By”<sup>183</sup>: The Public Domain Is Essential in Order to Comply with Constitutional Goals, but Should Be Modified to Better Protect Composers Through Means Other Than Continued Artistic Control*

A robust public domain must exist in order to benefit the public and comply with the goals of the Constitution’s Copyright Clause.<sup>184</sup> However, there is a concern that when compositions enter the public domain, uncopyrighted works will be tarnished or debased through uncontrolled uses that are poorly made or inappropriate.<sup>185</sup>

One may argue that a creator’s legacy can still be protected even when his or her works enter the public domain if public domain users are required to use the works in a way that is compatible with the creator’s original intent in an effort to

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<sup>179</sup> Arewa, *supra* note 23, at 551.

<sup>180</sup> *See supra* Part II.A.

<sup>181</sup> Liu, *Copyright and Time: A Proposal*, *supra* note 7, at 446.

<sup>182</sup> Keith Caulfield, *Rewinding the Charts: In 1942, Bing Crosby’s ‘White Christmas’ Reigned at No. 1*, BILLBOARD (Oct. 31, 2017), <https://www.billboard.com/articles/columns/chart-beat/8022047/white-christmas-bing-crosby-number-1-rewinding-charts>.

<sup>183</sup> HERMAN HUPFELD, *AS TIME GOES BY* (Harms, Inc. 1931).

<sup>184</sup> *Designing the Public Domain*, 122 HARV. L. REV. 1489, 1495 (2009).

<sup>185</sup> Buccafusco & Heald, *supra* note 80, at 4.

maintain the works' integrity. That is, a George Gershwin glissando<sup>186</sup> could not be used as the beat of a techno song, a clever Cole Porter couplet could not be used as the lyrics of a disco tune, and an Irving Berlin ballad would be prohibited from being played as an upbeat rock song. However, allowing only certain usages of a public domain song would be problematic because this would require some entity—most likely the trustees of an estate—to use subjective principles and guidelines to assume the intentions of a deceased composer. The problems of such a subjective framework are currently demonstrated in the context of copyrighted works over which heirs currently have broad artistic control. As explained below, heirs have strict control over who can use copyrighted pieces, but still allow for new adaptations of past works when the heirs *personally* believe the adaptations would benefit the deceased composers' music.<sup>187</sup> This inconsistent licensing approach shows that the subjectivity inherent in artistic decisionmaking is unworkable for a robust public domain. Therefore, a public domain without artistic limits must be trusted to carry out the constitutional goal of promoting progress of the arts.

1. Trust in the public domain is necessary to promote progress of the arts

The public domain should continue to be free of artistic restrictions in order to promote progress of the arts. Both James Madison and Thomas Jefferson preferred a system of unregulated access in the form of a liberal public domain to encourage information and discovery, as opposed to government-sanctioned monopolies, such as copyright laws.<sup>188</sup> Modern scholarship about the public domain is also overwhelmingly in favor of a truly free public domain, calling the public domain a “wellspring of creativity”<sup>189</sup> and equating it to the right to free

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<sup>186</sup> One of the most famous two-bar phrases in twentieth-century music is the clarinet glissando opening of George Gershwin's 1924 orchestral piece *Rhapsody in Blue* in which the clarinet plays a two-and-half-octave run of notes, reminiscent of a wail. See Jer-Ming Chen, John Smith & Joe Wolfe, *How to Play the First Bar of Rhapsody in Blue*, PROCEEDINGS OF ACOUSTICS 1 (2008), <http://newt.phys.unsw.edu.au/jw/reprints/ChenetalRhapsody.pdf>.

<sup>187</sup> See *infra* Part III.C.2.

<sup>188</sup> *Designing the Public Domain*, *supra* note 184, at 1494.

<sup>189</sup> Liu, *The New Public Domain*, *supra* note 8, at 1415.

speech.<sup>190</sup> The purpose of the public domain is to “serve as a rich repository of material for subsequent authors to draw upon for their own works, without concerns about infringement or securing licenses.”<sup>191</sup> A “rich and vibrant public domain” would lead to more creativity,<sup>192</sup> and therefore achieve the Copyright Clause’s goal.

One fear of the public domain is that artists will be able to change existing works into inappropriate or even vulgar adaptations that are at odds with the creator’s original intent,<sup>193</sup> without being subject to repercussions that exist while a work is copyrighted. For example, Music Theatre International, the licensing body for the wholesome 1957 and still-copyrighted Broadway musical *The Music Man*, set in Iowa in 1912, was able to enjoin a regional production of the show in 2017 that had not only cut two songs and changed the show’s setting, but made the show vulgar and inappropriate.<sup>194</sup> However, the effects of an interpretation so at-odds with an original work in the public domain can be mitigated through a disclaimer, as discussed in Part A.<sup>195</sup> Furthermore, scholars have also rejected the arguments that less copyright protection will lead to the underuse of public domain work,<sup>196</sup> and inversely that less protection will lead to overuse that will undermine a work’s

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<sup>190</sup> Pamela Samuelson, *Enriching Discourse of Public Domains*, 55 DUKE L.J. 783, 806 (2006). Scholar Joseph P. Liu has even argued that this accessibility to works should begin before works officially enter the public domain in that older copyrighted works should be more accessible to the public than newer copyrighted works. Liu, *Copyright and Time: A Proposal*, *supra* note 7, at 409–10. Liu argues that in addition to the four factors of a fair use analysis, courts should also consider the factor of time. *Id.* at 426. He reasons that after a certain amount of time, the author has already had a sufficient amount of time to create new works, and no longer needs such strict copyright protection in order to be incentivized to create more works. *Id.* at 437–38. Furthermore, as time goes on, a copyrighted work “is more likely to be part of the common stock of works and ideas that others have encountered and wish to build upon.” *Id.* at 439.

<sup>191</sup> Liu, *Copyright and Time: A Proposal*, *supra* note 7, at 440.

<sup>192</sup> Liu, *The New Public Domain*, *supra* note 8, at 1417.

<sup>193</sup> Buccafusco & Heald, *supra* note 80, at 4.

<sup>194</sup> Olivia Clement, *How A Young Director’s Modern Take on The Music Man Was Nearly Shut Down—For Good*, PLAYBILL (Sep. 14, 2017), <http://www.playbill.com/article/how-a-young-directors-modern-take-on-the-music-man-was-shut-downnearly-for-good>.

<sup>195</sup> See *supra* Part III.A.1.

<sup>196</sup> Buccafusco & Heald, *supra* note 80, at 3–4.



cultural value.<sup>197</sup> Without a truly free public domain, artists would not be able to create new masterpieces in response to previous works. For example, the Broadway classic *West Side Story* might never have been created since it took William Shakespeare's *Romeo and Juliet* and moved it to New York, adding an orchestra and snapping.<sup>198</sup> Though it can be assumed that Shakespeare would have considered *West Side Story* an inappropriate use of his work by sixteenth-century standards, *West Side Story* has left a massive legacy on Broadway, and is not currently viewed as an inappropriate version of a public domain work, but rather as a masterpiece that stands on its own.<sup>199</sup> Therefore, a public domain without artistic restrictions is necessary to comply with the Copyright Clause.

2. Though safeguards in the public domain are necessary, a safeguard by which estates retain artistic control would be unworkable

Estates are unpredictable when deciding whether to approve or reject certain uses of copyrighted works. This problem forecasts the unworkability of a public domain safeguard that would allow an artist to use a work for free but would also give an estate the artistic control to bar the use of a work that is at odds with the composer's original intent of a piece. A public domain with prohibitions on certain uses of uncopyrighted works would be unworkable due to the subjective nature of decision-making. It is impossible to determine a deceased composer's intent, especially when estates are run by family members far removed from the composer, who cannot be sure of the composer's intent years after the original creation of a work, even if the composer left behind detailed instructions. Perhaps the composer would have wanted his or her work to remain the same over time; perhaps the composer would have wanted the piece to change with the passage of time.

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<sup>197</sup> *Id.* at 4. Buccafusco and Heald argue that market discipline makes overuse in the public domain unlikely because overusing the same music would alienate customers and simply be bad business. *Id.* at 32–33.

<sup>198</sup> See Liu, *Copyright and Time: A Proposal*, *supra* note 7, at 437, 437 n.157.

<sup>199</sup> Pia Catton, "West Side Story" Was Originally About Jews and Catholics, HISTORY (Sep. 26, 2017), <http://www.history.com/news/west-side-story-was-originally-about-jews-and-catholics>.

The CTEA has permitted estates to maintain continued artistic control of copyrighted works while receiving revenues for a longer period of time.<sup>200</sup> However, the Gershwin estate's decisions related to productions of Gershwin shows have been unpredictable because they have been guided by individual trustees' subjective opinions on what should happen to the Gershwins' works. For example, the George Gershwin Trust closely controls the casting of productions of the Gershwins' opera, *Porgy and Bess*, by stipulating that in English-language performances, black performers must play the roles of black characters.<sup>201</sup> However, in 2012, the Gershwin estate licensed a new Broadway version of *Porgy and Bess*, and rebranded it *The Gershwins' Porgy and Bess*, cutting down its original runtime of four hours to make it more accessible to audiences.<sup>202</sup> Jonathan Keidan, great-nephew of the Gershwins and trustee of George Gershwin's estate said that it is the heirs' responsibility "to not have 'Porgy and Bess' stuck in an attic, to open up the property to younger generations, and to make money for the families."<sup>203</sup> Similarly, trustee Marc Gershwin has said that though the original may always be performed, "that doesn't mean it has to be a museum piece."<sup>204</sup> In creating this updated version of *Porgy and Bess*, the trustees used their own personal ideas of what they thought would be best for the Gershwins' work, utilizing a subjective framework that would be unworkable for the public domain.

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<sup>200</sup> Arewa, *Copyright on Catfish Row*, *supra* note 40, at 324. The CTEA even "permits continued control of copyright-protected works for uses and purposes that have little to do with the creation of new works." *Id.* For example, the Gershwin family has refused to release photographs of the Gershwins unless stubble was airbrushed away. *Id.* at 321.

<sup>201</sup> *Id.* at 325.

<sup>202</sup> Jeff Lunden, *Managing The Gershwins' Lucrative Musical Legacy*, NPR (Apr. 27, 2012), <http://www.npr.org/2012/04/27/151208200/managing-the-gershwins-lucrative-musical-legacy>. These changes to *Porgy* prompted Broadway composer and lyricist Stephen Sondheim to write a scathing op-ed in which he decried the changes to the show, particularly the rebranding of the show's name: "I assume that's in case anyone was worried it was the Rodgers and Hart 'Porgy and Bess' that was coming to town." *Stephen Sondheim Writes A Blistering Response to Revisions In Porgy and Bess*, BROADWAY BUZZ (Aug. 10, 2011), <https://www.broadway.com/buzz/157310/stephen-sondheim-writes-a-blistering-response-to-revisions-in-porgy-and-bess/>.

<sup>203</sup> Patrick Healy, *The Songs Remain the Same, but Broadway Heirs Call the Shots*, N.Y. TIMES (Jan. 9, 2012), <http://www.nytimes.com/2012/01/09/theater/with-porgy-on-broadway-gershwin-heirs-flex-their-rights.html>.

<sup>204</sup> *Id.*

Furthermore, multiple Songbook estates have created new Broadway musicals using the song catalogues of composers. In 1998, the Gershwin estate commissioned a new book for the Gershwins' 1926 show, *Oh, Kay!*<sup>205</sup> In 2012, the Gershwin estate created *Nice Work If You Can Get It*, a show with an original plot, based around songs of the Gershwins' catalogue that first premiered in original Gershwin shows in the early 1900s.<sup>206</sup> In 2015, *An American in Paris*, a new show based on the 1951 movie of the same name which features the Gershwins' music, opened on Broadway.<sup>207</sup> Most recently, *Holiday Inn: The New Irving Berlin Musical* opened on Broadway, and like *The Gershwins' Porgy and Bess*, included the composer's name as part of the show's title.<sup>208</sup> The plot was based on the 1942 film *Holiday Inn*, but included additional Berlin songs.<sup>209</sup> Theater critic Jesse Green took a cynical view of the show, writing that "each year dumps another bushel of Berliniana into the public domain; if the songs are not gathered into a new dramatic work that remonetizes them, the income they produce for the rights holders drops to zero."<sup>210</sup> In 1984, the Rodgers & Hammerstein Organization, an organization that now controls not only the works of Rodgers & Hammerstein but also the works of other Great American Songbook composers, including Irving Berlin,<sup>211</sup> licensed a production of *South Pacific* at New York University that was set in a rehab ward for war veterans, instead of on a Pacific island.<sup>212</sup>

So, although estates have stringent licensing policies, requiring users to receive permission before using a copyrighted work,<sup>213</sup> estates have broad control in changing existing shows and making artistic decisions. It is impossible to determine

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<sup>205</sup> *The Gershwin Estates OKs a New Oh, Kay!*, PLAYBILL (Jun. 25, 1998), <http://www.playbill.com/article/the-gershwin-estate-oks-a-new-oh-kay-com-76223>.

<sup>206</sup> *Nice Work If You Can Get It: The Gershwin Brothers' Toe-Tapping Journey Back to Broadway*, BROADWAY BUZZ (Apr. 23, 2012), <https://www.broadway.com/buzz/161308/nice-work-if-you-can-get-it-the-gershwin-brothers-toe-tapping-journey-back-to-broadway/>.

<sup>207</sup> *An American in Paris*, PLAYBILL, <http://www.playbill.com/production/an-american-in-paris-palace-theatre-vault-0000014074> (last visited Oct. 25, 2018).

<sup>208</sup> Green, *supra* note 16.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *About Rodgers and Hammerstein*, RODGERS AND HAMMERSTEIN, [http://www.rnh.com/about\\_us.html](http://www.rnh.com/about_us.html) (last visited Oct. 23, 2018).

<sup>212</sup> Healy, *supra* note 204.

<sup>213</sup> *Request Song License*, RODGERS AND HAMMERSTEIN, <http://www.rnh.com/license-request-song.html> (last visited Oct. 23, 2018).

whether George and Ira Gershwin would want to continue such a stringent casting policy for *Porgy*, whether they would have approved of a shorter version of *Porgy*, whether the Gershwins and Berlin would have approved of musicals loosely based on their films, and whether Richard Rodgers and Oscar Hammerstein would have approved of an interpretation of one of their shows that was such a severe departure from the original. It is also impossible to know whether George Gershwin would have wanted his premier symphonic piece, *Rhapsody in Blue*, to be used to sell airline tickets.<sup>214</sup>

A public domain in which uncopyrighted music would still be subject to an approval process would give too much control to heirs who do not know what the composers would have wanted if they were still alive. Still, even if composers leave detailed instructions behind,<sup>215</sup> a public domain without prohibitions on uses is necessary in order to promote progress of the arts.

Therefore, the proposal in this Note sets out a framework in which music enters the public domain, but a framework that includes newly-created safeguards—the requirement that a user attribute the original creator and the requirement that a user donate royalties to cultural institutions—to ensure that the legacies of composers and their music are remembered.

#### “THANKS FOR THE MEMORY”<sup>216</sup>

On January 1, 2019, music compositions from 1923 entered the public domain and are for the first time ever available for use without requiring prior permission or payment of a fee. It is unworkable to continue to extend the duration of copyright protections because, under the Constitution, copyright must last for only a limited time and must promote progress of the arts. However, the first pieces of music to enter the public domain are

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<sup>214</sup> See Tom Shales, *Gershwin's Rhapsody Perfect Pitch? Commercializing a Classic To Sell United's Friendly Skies*, WASH. POST (Nov. 25, 1987), [https://www.washingtonpost.com/archive/lifestyle/1987/11/25/gershwins-rhapsody-perfect-pitch-commercializing-a-classic-to-sell-uniteds-friendly-skies/fff855e7-4a7f-4d40-80d6-260c06c59147/?utm\\_term=.9e3e56b7f45b](https://www.washingtonpost.com/archive/lifestyle/1987/11/25/gershwins-rhapsody-perfect-pitch-commercializing-a-classic-to-sell-uniteds-friendly-skies/fff855e7-4a7f-4d40-80d6-260c06c59147/?utm_term=.9e3e56b7f45b) (discussing United Airlines' use of *Rhapsody in Blue*).

<sup>215</sup> John Kander, the composer of Broadway shows such as *Cabaret* and *Chicago* said, “I do think that, as composers and writers, we should leave pretty specific instructions to our estates about how we want our work to be protected.” Healy, *supra* note 204.

<sup>216</sup> RALPH RAINGER & LEO ROBIN, THANKS FOR THE MEMORY (Paramount Music Corp. 1937).

the works of the culturally and musically significant Great American Songbook, a group of works from renowned composers and lyricists from the second quarter of the twentieth century.

Congress should implement safeguards in order to protect the legacies of past composers. A law requiring public domain users to use the work with the original composer's intent in mind would be unworkable due to this guideline's subjectivity. Therefore, there can be no safeguard related to the artistic interpretation of a public domain work. However, safeguards in the public domain should be created in the form of name and disclaimer requirements. Public domain users who recopyright public domain works should also be required to donate a portion of their royalties to estates to be used to preserve the music's legacy and educate the public.

If these safeguards had existed in 1956, George Poulton, the composer of "Aura Lee," would have been able to claim more of a role in American cultural history once his melody was reintroduced to a new generation by Elvis Presley. Steps must be taken to prevent what happened to Poulton from happening again in the future. These proposed safeguards will help to ensure that the next generation of artists in the public domain, Great American Songbook composers, maintain a place in America's cultural history.