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# The Uncoordinated Public Domain

Robert Spoo

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## THE UNCOORDINATED PUBLIC DOMAIN<sup>♦</sup>

ROBERT SPOO\*

*When nations amend their copyright laws in response to calls for international harmonization, they usually expand authors' rights without also seeking to harmonize national public domains. Divergent national copyright laws have resulted in an uncoordinated global public domain that renders authors' works freely available for use in some countries while subjecting them to copyright or moral-rights protection in others. While the fragmented global commons thwarts many valuable uses of cultural resources, it has especially deleterious effects on the ability of researchers to access, copy, and disseminate historical and literary materials, many of which remain unpublished. These effects are mirrored and exacerbated by the inconsistent policies of cultural repositories that control access to millions of documents and images. The uncoordinated public domain shares certain features—notably, fragmented ownership and resource underuse—with an anticommmons. This Article offers a theoretical framework for understanding the uncoordinated public domain, and illustrates the tragic inefficiencies of this patchwork commons by discussing its impact on a number of research and publishing projects involving modern authors—in particular, James Joyce. A balanced solution to the checkerboard effects of the commons would be to employ a treaty-based system of compulsory licenses to harmonize national public domains and to coordinate the legal conditions whereby the world's vast informational resources could be globally disseminated by researchers and other users.*

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#### INTRODUCTION

The creativity that copyrights protect is a public good. Because public goods are nonexcludable and nonrivalrous—that is, by their nature, they cannot be fenced off, and their consumption by one person does not prevent others from consuming them equally—they pose certain problems not found in the law of real or personal property.<sup>1</sup> Copyrighted works, in our age of digital reproduction and online distribution, may be made instantly available for consumption by many persons in many places at the same time, thus fully inhabiting their role as public goods. If copyright laws were uniform in all respects throughout the world, works would receive protection for a fixed number of years (most copyrights have limited terms)<sup>2</sup> and then would enter a single, global public domain where they could be exploited by anyone anywhere without permission or risk of liability. But copyright laws are not uniform throughout the world. Profound disparities in the

<sup>1</sup> See Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159, 164 n.13 (2002); Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387–89 (1954). I do not discuss here the ways in which anti-circumvention technologies and other digital, contractual, or statutory protections may alter the nonexcludable character of public goods, such as copyrighted works. See generally Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999) (exploring the dangers posed to the public domain, broadly construed, by federal anti-circumvention laws, proposed mass-market licensing rules, and proposed federal database legislation).

<sup>2</sup> Perpetual copyrights are rare today, but they exist in some countries. For example, copyrights in unpublished literary, dramatic, and musical works are perpetual in Australia. See *infra* note 140 and accompanying text. Copyrights in certain unpublished governmental works are perpetual in Singapore. See Copyright Act, 1987, c. 63, § 197 (Sing.). The United Kingdom has enacted special legislation creating a perpetual charitable royalty in performances, broadcasts, and publications of J.M. Barrie’s play, *Peter Pan*. See Copyright, Designs and Patents Act 1988, c. 48, § 301 (Eng.). In France, authors’ moral rights (though not their copyrights) are perpetual. See *infra* notes 196–199 and accompanying text.

length and scope of copyrights from country to country create global disharmony in the protection and availability of creative works. The most significant consequence of this disharmony, for the present inquiry, is that it perpetuates a tragedy of the uncoordinated public domain. As discussed below, this uncoordinated global commons shares features with what has come to be known as an anticommons<sup>3</sup>—notably, fragmented conditions of ownership and resulting resource underuse—though it differs in a number of ways as well.

The uncoordinated public domain that has resulted from divergent national copyright laws renders authors' rights and users' privileges challenging to define from jurisdiction to jurisdiction. If copyright permissions were always easily obtained, or if legal exceptions favoring users—such as fair use—were uniform throughout the world, then this global disharmony would be less troublesome. But copyright exceptions vary widely from country to country;<sup>4</sup> and literary estates (and other copyright owners) are often unpredictable. Sometimes they are intractable, uncomprehending, or financially unreasonable, even when users succeed in locating them.<sup>5</sup> Often, copyright owners cannot be located at all, and many countries do not require copyrights to be registered,<sup>6</sup> with the result that users are confronted with an “orphan works” problem, for which, again, no uniform transjurisdictional legal solution exists.<sup>7</sup> The challenge of unknown or uncooperative owners is

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<sup>3</sup> See generally Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998) (articulating a theory of the anticommons and discussing types of anticommons).

<sup>4</sup> See *infra* notes 84–105 and accompanying text.

<sup>5</sup> Literary estates that have been notoriously obstructive include those of Samuel Beckett, Bertolt Brecht, T.S. Eliot, James Joyce, Marianne Moore, Sylvia Plath, and J.D. Salinger. See Matthew Rimmer, *Copyright Estates and Cultural Festivals*, 2 SCRIPTED: J.L. TECH. & SOC'Y 345, 368–69, 402–03, 406–08, 408–412, 427 (2005), <http://www.law.ed.ac.uk/ahrc/script-ed/vol2-3/bloomsday.pdf> (discussing the estates of Beckett, Brecht, Eliot, Joyce, Plath, and Salinger); Robert Spoo, *Ezra Pound's Copyright Statute: Perpetual Rights and the Problem of Heirs*, 56 UCLA L. REV. 1775, 1819–27 (2009) (discussing Eliot, Moore, and Beckett); D.T. Max, *The Injustice Collector: Is James Joyce's Grandson Suppressing Scholarship?*, NEW YORKER, June 19, 2006, at 34, 36–37 (discussing Eliot, Joyce, Moore, and Plath).

<sup>6</sup> See Marc E. Hankin, *Comment: Now that We Know “The Way Forward,” Let Us Stay the Course*, 77 CHI.-KENT L. REV. 1295, 1300 n.20 (2002) (“Most countries throughout the world neither require nor permit registration of copyrights . . .”); Lea Shaver, *The Right to Science and Culture*, 2010 WIS. L. REV. 121, 149 (2010) (noting the “strong international norm in favor of automatic copyright protection without registration or renewal requirements”).

<sup>7</sup> For example, Canadian legislation authorizes the Copyright Board of Canada to issue nonexclusive licenses to anyone, for a specified period and a royalty fee, for the use exclusively within Canada of published works and fixed performances and broadcasts when rights-holders cannot be located and the applicant has made reasonable efforts to locate them. See Copyright Act, R.S.C., 1985, c C-42, § 77 (Can.); COPYRIGHT BD. OF CAN., UNLOCATABLE COPYRIGHT OWNERS (2001), <http://www.cb-cda.gc.ca/unlocatable-introuvables/brochure2-e.html>. A 2012 E.U. directive permits libraries and other heritage institutions in the European Union, after a diligent search for copyright owners, to reproduce and make publicly available published and certain unpublished orphan works held in the institutions' collections. See Directive 2012/28/EU of the European Parliament and of the Council of 12 Oct. 2012 on Certain Permitted Uses of

especially acute with respect to unpublished works.<sup>8</sup> I am chiefly concerned in this Article with what has been called the unpublished public domain: works that have not been disseminated to the public and in which copyright protection, if it ever existed, has expired.<sup>9</sup> In many cases the vast resources of the unpublished public domain are held in cultural repositories throughout the world, but, because of divergent national copyright laws, unpredictable estates, and inconsistent archival norms, these resources often remain underexploited. The result is a tragedy of the uncoordinated global commons. The victims of this resource tragedy include thwarted users of unpublished materials along with the public, which is deprived of cultural and informational benefits.

In suggesting that the uncoordinated public domain has a tragic aspect, I am aware that the notion of resource tragedy has classically been applied to a physical commons, such as an over-fished lake or an over-grazed pasture. When Garrett Hardin articulated the idea of the tragedy of the commons,<sup>10</sup> he was thinking of Greek tragedies in which the central hero's hubristic choices set in motion the machinery of fate

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Orphan Works, O.J. (L.299) pmb. ¶¶ 1, 13, art. 1, ¶ 2, art. 6, ¶ 1. The United Kingdom has established rules, separate from the E.U. initiative, that permit anyone, after a diligent search for the copyright owner, to obtain from the U.K. Intellectual Property Office a nonexclusive license for use of an orphan work, published or unpublished, exclusively within the United Kingdom, after payment of an application fee and a reasonable license fee to be held in escrow in the event the copyright owner identifies herself. *See* Enterprise and Regulatory Reform Act 2013, c. 24, § 77 (Eng.) (codified in Copyright, Designs and Patents Act, 1988, c. 48, § 116A (Eng.)); Copyright and Rights in Performances (Licensing of Orphan Works) Regulations, 2014, SI 2014/2863, ¶¶ 3–4, 6, 8–10 (Eng.); LIONEL BENTLEY & BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 330–32 (4th ed. 2014). Plainly, there are stark differences among the British, Canadian, and E.U. rules regarding who may seek a license and the kinds of works that may be licensed. In the United States, legislation has been proposed, but not enacted, that would limit the damages recoverable for infringement of the copyright in an orphan work if the infringer performed a reasonably diligent search for the copyright owner and met other statutory requirements. *See* Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008); Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008).

<sup>8</sup> *See* R. Anthony Reese, *Public but Private: Copyright's New Unpublished Public Domain*, 85 *TEX. L. REV.* 585, 605 (2007) (discussing the costs involved in “tracing copyright ownership of older unpublished works”).

<sup>9</sup> For a similar use of “unpublished public domain,” *see id.* at 586–88; Elizabeth Townsend Gard, *January 1, 2003: The Birth of the Unpublished Public Domain and Its International Implications*, 24 *CARDOZO ARTS & ENT. L.J.* 687, 690 (2006); Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 *DUKE L.J.* 783, 809–811 (2006). There are many definitions of the public domain. *See* Reese, *supra* note 8, at 586–88 nn.3–7; Pamela Samuelson, *Challenges in Mapping the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW* 7, 9–21 (Lucie Guibault et al. eds., 2006). I use the term here largely in the sense of “works for which legal protection under copyright law has expired,” *see* Reese, *supra* note 8, at 588, though I consider certain user-benefiting rules, such as fair use, to be commons-expanding devices. *See infra* note 29 and accompanying text. The impact of rule-fragmentation on two other public domains—those of published works and of sound recordings—is discussed *infra* Part I.

<sup>10</sup> Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1244–45 (1968).

that inexorably leads to collective disaster.<sup>11</sup> Hardin's rational herdsmen, each maximizing his gain by grazing his cattle without regard for the land's carrying capacity, are tragic heroes "locked into a system" that eventually "brings ruin to all."<sup>12</sup> The curtain is rung down on a scene in which individual belief in the freedom of the commons has led to the catastrophe of resource destruction. The essence of Hardin's tragedy is the remorseless consequences arising from unlimited behavior in a limited environment.

Resource tragedies may also come to unlimited environments.<sup>13</sup> Michael Heller has traced the tragedy of the anticommons—in which fragmented ownership or fragmented decision-making results in the underuse of a resource<sup>14</sup>—to such diverse public goods as drug patents,<sup>15</sup> music sampling,<sup>16</sup> documentary films,<sup>17</sup> and air traffic control standards.<sup>18</sup> Here, tragedy is found not in the eventual extinction of a physical resource, but rather in the present-day gridlock and "wasteful underuse" of a resource that by its nature is nonexcludable and nonrivalrous.<sup>19</sup> A public-good anticommons can result from failure to aggregate or coordinate fragments of intangible ownership in ways that would permit decision-making and unlock the value of the stagnating resource.<sup>20</sup> Tragedy is experienced in the day-to-day futility of an unlimited resource rather than anticipated in the future demise of a limited one.

The uncoordinated public domain poses just such a problem of unlimited but stagnating resources. This public domain is not an anticommons, but it shares with some types of anticommons the daily tragedy of gridlock and wasteful underuse brought about by uncoordinated rules and stymied decision-making. Tragedy in this

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<sup>11</sup> See *id.* at 1244 ("The essence of dramatic tragedy is not unhappiness. It resides in the solemnity of the remorseless working of things.") (quoting A.N. WHITEHEAD, *SCIENCE AND THE MODERN WORLD* 17 (1948)); see also JOHN ADDINGTON SYMONDS, *STUDIES OF THE GREEK POETS, FIRST SERIES* 204 (2d ed. 1877) ("Nemesis [or avenging fate] is the fundamental idea of the Greek tragedy. It appears strongest in Æschylus, as a prophetic and awful law, mysteriously felt and terribly revealed.").

<sup>12</sup> Hardin, *supra* note 10, at 1244.

<sup>13</sup> See Eli M. Salzberger, *Economic Analysis of the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW* 27, 33–36, 39 (L. Guibault et al. eds., 2006) (comparing and contrasting tragedies of the physical commons and the intangible public domain).

<sup>14</sup> See Michael Heller, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* 1–2, 26 (2008).

<sup>15</sup> See *id.* at 4–6.

<sup>16</sup> See *id.* at 13–16.

<sup>17</sup> See *id.* at 9–11.

<sup>18</sup> See *id.* at 19. For examples of a regulatory anticommons, see *id.* at 2 (competing state and federal regulation of financial instruments); see also *id.* at 3–4 (spectrum gridlock resulting from the FCC's granting of hundreds of regional licenses).

<sup>19</sup> See *id.* at 26.

<sup>20</sup> See *id.* at 2.

public domain is not manifested in congested ownership of a single resource, as with an anticommons,<sup>21</sup> but instead in the under-exploitation of a resource, such as a work of authorship, subject to inconsistent copyright laws that render the resource freely available for unauthorized use in some countries but protected by copyright in others. Here the stage of tragedy is global, or multinational. Wasteful underuse is projected upon the plane of geography—a product of uncoordinated national rules—not unlike Europe’s inefficient air traffic control system that has been described as “fragmented by national boundaries and differing technical standards.”<sup>22</sup>

It is true that we can expect some public-domain congestion to dissipate as older works gradually shed their copyrights in various countries. But a true global commons for many works of authorship is a distant prospect and will remain so as long as sharply divergent and sometimes anomalous laws—for example, the 2039 rule for unpublished works in the United Kingdom,<sup>23</sup> the ninety-five-years-from-publication durational term for older published works in the United States,<sup>24</sup> and the author’s-life-plus-eighty-years term in Spain<sup>25</sup>—continue to erect barriers to unauthorized worldwide dissemination. Transition can sometimes take on the features of tragedy.<sup>26</sup> For some works in some countries, the transition from copyright to public domain will be so protracted that resource underuse will be a familiar experience for many years to come. Moreover, some features of international copyright law, such as post-copyright copyrights in the European Union<sup>27</sup> and the tendency of nations to revive or extend copyrights for older works,<sup>28</sup> threaten to make public-domain tragedy a permanent or at least a recurrent performance on the global stage.

While many aspects of copyright law produce global disharmony, I

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<sup>21</sup> See Henry C. Mitchell, *THE INTELLECTUAL COMMONS: TOWARD AN ECOLOGY OF INTELLECTUAL PROPERTY* 54–55 (2005).

<sup>22</sup> See HELLER, *supra* note 14, at 19 (quoting John Tagliabue, *A Debate in Europe over Air Traffic Control*, N.Y. TIMES, Aug. 25, 2002, (Travel), at 3). Some scholars have questioned the use of geographical metaphors for characterizing copyright’s public domain. *E.g.*, Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW* 121, 127–37 (L. Guibault et al. eds., 2006). I am not using geography as a metaphor here, but rather identifying it as an actual, bounded, nation-based obstacle to a global information commons.

<sup>23</sup> See *infra* notes 143–150 and accompanying text.

<sup>24</sup> See *infra* note 45 and accompanying text.

<sup>25</sup> See *infra* notes 63–65 and accompanying text.

<sup>26</sup> *Cf.* HELLER, *supra* note 14, at 63–64 (critiquing the notion that short-term gridlock effects in drug development are merely transitions rather than tragedies).

<sup>27</sup> See *infra* notes 151–186 and accompanying text.

<sup>28</sup> See Joseph P. Liu, *The New Public Domain*, 2013 U. ILL. L. REV. 1395, 1425–27 (2013) (warning against future extensions of U.S. copyright terms); see also *infra* notes 91–93 and accompanying text.

focus primarily here on disparities in copyright duration, moral rights, and certain subsidiary rules, such as copyright limitations and exceptions.<sup>29</sup> By “global public domain,” I do not refer to all countries of the world, but rather to certain large and significant markets, as defined in the various contexts I isolate. An analysis of the conflicting laws of all nations is beyond the scope of this Article and would simply augment the picture of commons-fragmenting disharmony that I present. Indeed, the phrase “public domain” is something of a sanguine abstraction, since the divergences among national laws actually fracture the globe into many public domains.<sup>30</sup> Moreover, I use “public domain” and “commons” interchangeably here, fully aware that these terms denote different kinds of resources for some legal analysts.<sup>31</sup> When I liken what I call the uncoordinated public domain to certain anticommons problems, I am bringing together different property concepts for the purpose of highlighting commonalities of resource underuse and related pathologies.

This Article seeks to make visible a global problem of resource underuse that remains hidden as long as we fail to see that harmonization of disparate public domains is as important as harmonizing authors’ rights on the international level.<sup>32</sup> The world’s conflicting copyright and moral-rights regimes undermine the ability of users to engage in unfettered copying and dissemination of materials that may reside in the public domains of some or many countries, but not all countries. The fragmentation of the world’s commons is especially wasteful and demoralizing in a time when digital technologies and the Internet have made cross-border dissemination of texts and images virtually costless.<sup>33</sup> While both owners and users of

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<sup>29</sup> One could also explore, for example, varying national treatments of protectable subject matter, copyright ownership, and licensing and assignments. *See, e.g.*, Marketa Trimble, *The Multiplicity of Copyright Laws on the Internet*, 25 *FORDHAM INTELL. PROP. & ENT. L.J.* 339, 344 (2015). Some commentators treat fair use and other user-benefiting limitations and exceptions—some of which I discuss *infra* Parts I.B-I.C—as components of a broadly conceived public domain. *E.g.*, James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 *LAW & CONTEMP. PROBS.* 33, 68 (2003).

<sup>30</sup> Scholars sometimes use the term “public domain” even when they are fully aware that there is no such unitary commons. *See, e.g.*, SUSAN M. BIELSTEIN, *PERMISSIONS, A SURVIVAL GUIDE: BLUNT TALK ABOUT ART AS INTELLECTUAL PROPERTY* 35 (2006) (“That there exists a public domain is universally acknowledged, though . . . countries may differ on when cultural property enters it.”).

<sup>31</sup> *See, e.g.*, David Fagundes, *Property Rhetoric and the Public Domain*, 94 *MINN. L. REV.* 652, 685 n.146 (2010) (noting that use of “the term ‘information commons’ to refer to the public domain is somewhat misleading, because commons were subject to limited property rights”).

<sup>32</sup> *Cf.* HELLER, *supra* note 14, at 2 (noting that anticommons gridlock can remain “hidden” because “underuse is often hard to spot”).

<sup>33</sup> *See* Mark A. Lemley, *IP in a World Without Scarcity*, 90 *N.Y.U. L. REV.* 460, 464–71 (2015); *see also* Salzberger, *supra* note 13, at 51 (contrasting national and global conceptions of IP wealth maximization, and noting that “[i]deas cross territorial and political boundaries. . . . Intellectual community activities are a-territorial”).



copyrights are affected by these divergent laws, I am particularly concerned here with the plight of users, who, often dependent on copyright-free materials for their own authorship, are at the mercy of internationally mismatched property rules and the real or feared veto power of owners, and therefore keenly feel the impact of the uncoordinated global public domain.<sup>34</sup>

Part I of this Article sets the conceptual stage by distinguishing among a commons, an anticommons, and an uncoordinated public domain. After illustrating the impact of global copyright disharmony on a particular, culturally important work (*Finnegans Wake* by James Joyce (1882-1941)), Part I discusses three aspects of the uncoordinated public domain: the confusing rule of the shorter term, purportedly adopted for harmonizing divergent national copyright durations but in fact often applied in unpredictable, disharmonizing ways; divergent subsidiary copyright rules, such as limitations and exceptions to owners' rights, which contribute to the difficulties of unauthorized cross-border use of works; and the confused, conflicting laws governing pre-1972 sound recordings within the United States. Each of these examples offers a view of the fragmented cathedral of the global commons, where uncoordinated laws render the public domain local and piecemeal and threaten to make it difficult or impossible for unauthorized users to engage in unconstrained exploitation of works in global contexts.

Part II isolates a particularly tragic dimension of the uncoordinated public domain by focusing on the globally fragmented rules that impede the availability and use of unpublished works. A vast, uncharted cultural resource, the unpublished public domain is burdened by a bewildering array of conflicting national copyright and moral-rights laws that makes it difficult for researchers and other users to engage in transjurisdictional dissemination of important though often unknown materials. Part II vividly illustrates the wasteful underuse of the global public domain by showing how a current, real-life scholarly project organized to publish the unpublished letters of James Joyce has been confined to limited geographical distribution as a result of internationally discordant copyright laws, moral-rights restrictions, and post-copyright copyrights. Compounding this global disharmony are the practices of cultural repositories, whose informal norms regarding access to and copying of the materials they hold sometimes add a further layer of fragmentation and disharmony to the legal gridlock of the uncoordinated public domain.

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<sup>34</sup> Digital technologies are increasingly erasing the artificial legal distinction between authors and users. See P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright: Final Report*, OPEN SOCIETY INSTITUTE 38 (2008), [https://www.iprsonline.org/resources/IntLE\\_HughenoltzOkediji.pdf](https://www.iprsonline.org/resources/IntLE_HughenoltzOkediji.pdf).

Finally, Part III argues that some of the tragic effects of the uncoordinated public domain might be averted, or at least mitigated, by the adoption of an international, treaty-based scheme of compulsory licensing. Such a system would not repeal disharmony as the underlying legal reality of national copyright duration, but instead would permit users to bypass that legal reality and to exploit works in copyright countries by giving notice to copyright owners and agreeing to pay them a reasonable use fee. Compulsory licensing would thus function as a global liability rule to strike a balance between users' needs and owners' entitlements, and would approximate, resource by resource, license by license, a hybrid global commons consisting of traditional public-domain materials and licensed-domain materials. Although such a scheme would not easily solve all problems—authors' moral rights, for example, might prove resistant to compulsory licensing—it would be a significant step toward constructing a functionally unified global public domain. The familiar legislative goal of harmonizing copyrights would thus have a counterpart in a matching effort to harmonize public domains; and tragic underuse of important historical and cultural materials could give way to fruitful dissemination.

#### I. COMMONS, ANTICOMMONS, UNCOORDINATED PUBLIC DOMAIN

An uncoordinated public domain bears a certain resemblance to the more familiar anticommons. An anticommons is the antithesis of a nonexcludable resource commons. An anticommons results when multiple exclusive ownership rights concentrated in the same resource cannot be coordinated for purposes of decision-making, and as a consequence the resource suffers from underuse.<sup>35</sup> In early post-Soviet Moscow—to mention a canonical example—several owners typically held competing rights in the same commercial storefront, so that coordination of these rights proved difficult, and many storefronts remained unleased and empty.<sup>36</sup> Whereas a commons is threatened with overuse—too many exploiters of a single unowned resource<sup>37</sup>—an anticommons is threatened with underuse: too many owners of a single proprietary resource. Unrestrained group access can spell doom for a commons; unrestrained group exclusion creates an anticommons.<sup>38</sup> Expanding the dramatic metaphor lurking in the concept of tragedy, we might say that, in a threatened commons, the stage is overrun by unruly actors to the point where the drama loses all coherence. In an underused anticommons, the production has so many quarrelling investors that the play never gets put on at all.

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<sup>35</sup> See HELLER, *supra* note 14, at 1–2.

<sup>36</sup> See *id.* at 145–64; Heller, *supra* note 3, at 633–42.

<sup>37</sup> See Hardin, *supra* note 10, at 1244–45.

<sup>38</sup> See HELLER, *supra* note 14, at 40–41.

A copyright anticommmons is essentially no different from the Moscow storefront. The tendency toward underuse that is already inherent in a public-good monopoly<sup>39</sup> is intensified when multiple owners of exclusive rights in a copyrighted work can block each other.<sup>40</sup> Suppose, for example, that a researcher discovers an unpublished novel in a university archive. The novel seems significant, and its author, now deceased, is regarded as a major innovator of fiction. The scholar prepares the novel for publication, complete with an introduction and explanatory notes, and interests a press in publishing the edition. The scholar discovers, however, that multiple remote heirs of the author, more than a dozen, hold equal co-ownership rights in the work.<sup>41</sup> The heirs are scattered throughout the world, and it proves difficult to obtain the permission the press requires from each of them. The resulting coordination problem is exacerbated by the fact that the author's estate has no executor who can fill the vacuum of decision-making. The newly discovered novel, fully prepared for the press, remains unavailable in published form because there is no one who can easily gather the pieces of the copyright into an exclusively licensed bundle. Thus, an important document of literary history remains locked in an archive.<sup>42</sup>

<sup>39</sup> See Lemley, *supra* note 33, at 468 (noting that IP laws artificially create scarcity in public goods along with a deadweight loss to consumers and a lack of price-disciplining competition).

<sup>40</sup> See HELLER, *supra* note 14, at 45 (distinguishing between monopoly and anticommmons). An anticommmons can exist with respect to a public good no less than real property. For example, a copyright anticommmons became apparent when the creators of a 1987 television documentary on Martin Luther King, Jr., attempted to re-release the film as a DVD years after its initial broadcast. During the intervening years, licenses that had originally been granted by interviewees, Dr. King's estate, and others had expired, and the process of negotiating new permissions took nearly twenty years and hundreds of thousands of dollars. See *id.* at 9–11. Another common example of a public-good anticommmons is the “patent thicket,” where the inability to coordinate multiple patent rights contained within an invention blocks its commercialization. See *id.* at 5, 43; see also Adam Mossoff, *The Rise and Fall of the First American Patent Thicket: The Sewing Machine War of the 1850s*, 53 ARIZ. L. REV. 165 166–67 (2011) (characterizing historical patent thickets as an anticommmons problem).

<sup>41</sup> Cf. HELLER, *supra* note 14, at 2 (describing the anticommmons gridlock that often arises when multiple children inherit the family home).

<sup>42</sup> This hypothetical is based loosely, with alterations, on the discovery in 2009 of the typescript of *Amiable with Big Teeth*, a novel by the Harlem Renaissance author Claude McKay (1889–1948). The manuscript was unearthed by Jean-Christophe Cloutier in Columbia University's Rare Book and Manuscript Library. See Jean-Christophe Cloutier, *Amiable with Big Teeth: The Case of Claude McKay's Last Novel*, 20 MODERNISM/MODERNITY 557, 573 n.6 (2013). Cloutier and coeditor Brent Hayes Edwards are arranging to publish a scholarly edition of the novel. See E-mail from Jean-Christophe Cloutier, Assistant Professor of English, Univ. of Pa., to Robert Spoo (July 29, 2016, 09:31 CST) (on file with author). One possible solution to this hypothetical copyright anticommmons, in the United States at least, would be to locate one of the heirs who would be willing to give the press a nonexclusive publishing license. Any copyright co-owner may “[nonexclusively] use or . . . license the work as he or she wishes, subject only to the obligation to account to the other joint owner[s] for any profits that are made.” *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998). But publishers' norms favor exclusive licenses, not nonexclusive ones. See STEPHEN FISHMAN, *THE COPYRIGHT HANDBOOK: WHAT EVERY WRITER NEEDS TO KNOW* 21–22 (12th ed. 2014); Frank R. Curtis, *Protecting Authors in Copyright Transfers: Revision Bill § 203 and the Alternatives*, 72 COLUM. L. REV. 799, 813–14 (1972); E-

This is a straightforward example of a copyright anticommmons: underuse of a cultural resource resulting from fragmented, uncoordinated ownership rights. Created by federal copyright law and state intestacy law, this anticommmons is confined to recognizable jurisdictions and their rules—the federal and state laws of one country. If we change the example to one involving a single copyright owner but greater geographical complexity, a different coordination problem emerges. Take a simple case of conflicting international laws governing the duration of copyrights. James Joyce’s last book, *Finnegans Wake*, was simultaneously published in Britain and the United States in 1939.<sup>43</sup> In the European Union, which generally applies the term of the author’s life plus seventy years, *Finnegans Wake* entered the public domains of the United Kingdom and other E.U. countries at the end of 2011.<sup>44</sup> However, in the United States, where the applicable copyright term for works published prior to 1978 is ninety-five years from the year of first publication,<sup>45</sup> *Finnegans Wake* will remain in copyright through 2034.<sup>46</sup> The estate of James Joyce has often shown itself unwilling to grant permissions for scholarly projects,<sup>47</sup> and, although at least one new edition of *Finnegans Wake* has appeared in the European Union since 2011,<sup>48</sup> no new editions have been created and published in the United

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mail from Suzanne Ryan, Editor in Chief, Humanities, Oxford Univ. Press U.S.A., to Robert Spoo (July 6, 2016, 08:50 CST) (on file with author).

<sup>43</sup> See JOHN J. SLOCUM & HERBERT CAHOON, A BIBLIOGRAPHY OF JAMES JOYCE 59–61 (photo. reprint 1971) (1953).

<sup>44</sup> See Council Directive 93/98/EEC, art. 1, 1993 O.J. (L. 290) 9 (EC) (requiring member countries to implement a term of protection equal to the life of the author plus seventy years) [hereinafter Directive 93/98/EEC]. It is unclear as of this writing how Britain’s exit from the European Union will eventually affect Britain’s intellectual property laws. See Richard Rossington, *No Need for Brexit Panic Over IP Laws*, LAW. MONTHLY (June 29, 2016), <http://www.lawyer-monthly.com/2016/06/no-need-for-brexit-panic-over-ip-laws/>. My discussion of British and E.U. law in this Article is based on pre-Brexit conditions.

<sup>45</sup> Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102(d)(1)(B), 112 Stat. 2827, 2828 (1998) (codified at 17 U.S.C. §§ 302, 304 (1998, 2002)) (increasing U.S. copyright terms in works published before 1978 from seventy-five years to ninety-five years from the year of first publication).

<sup>46</sup> Because of uncoordinated or formality-based copyright terms, the situation illustrated here is often reversed, with copyright in a work having expired in the United States and still existing in the European Union. See BIELSTEIN, *supra* note 30, at 29 (discussing a Picasso etching that is unprotected in the United States and protected in Europe).

<sup>47</sup> See *supra* note 5 (citing authorities); see generally Robert Spoo, *Archival Foreclosure: A Scholar’s Lawsuit Against the Estate of James Joyce*, 71 AM. ARCHIVIST 544 (2008) (discussing the Joyce estate’s opposition to academic scholarship on Joyce).

<sup>48</sup> A recent edition of *Finnegans Wake*, prepared and published in Europe by Robert Jan-Henkes, Erik Bindervoet, and Finn Fordham (Oxford: Oxford University Press, 2012), is widely available in Britain and the European Union. See E-mail from Finn Fordham, Professor of English, Royal Holloway Univ. of London, to Robert Spoo (Oct. 4, 2015, 04:07 CST) (on file with author). This edition is apparently available for importation into the United States, see E-mail from William S. Brockman, Paterno Family Librarian for Literature, Penn State Univ. Arts and Humanities Library, to Robert Spoo (Jan. 1, 2016, 11:36 CST) (on file with author), though it could not have been lawfully created or initially published there without permission of the Joyce estate.

States during that period. In the absence of permission, this geographical asymmetry of scholarly work on Joyce's book is likely to continue for years to come.

Even if *Finnegans Wake* had initially been published in Britain as the sole country of origin, it would still likely be treated as protected in the United States today, despite its public-domain status in the European Union. This is because the United States does not apply what is called the rule of the shorter term, adopted by other signatories to the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") as an exception to Berne's rule of national treatment (which requires each Berne country to treat works originating in other Berne countries as it would treat the works of its own authors).<sup>49</sup> Under the rule of the shorter term, Country B will not apply its longer copyright term to a work whose copyright has expired in Country A, the country of the work's origin, but will instead apply the origin country's shorter term.<sup>50</sup> Having omitted the rule from its limited adoption of the Berne Convention,<sup>51</sup> the United States protects many works whose copyrights have expired in their countries of origin.<sup>52</sup>

The example of *Finnegans Wake* highlights a clash of national rules that renders that important work freely available for public-domain uses in some countries but not in others. The global gridlock that may result resembles the central problem of an anticommons: the wasteful underuse of a resource caused by fragmented, uncoordinated conditions of ownership.<sup>53</sup> Unlike a typical ownership anticommons, however, this type of gridlock does not arise from a concentration of multiple owners' rights in a single resource within a single jurisdiction, but rather from the fact that a single copyright owner holds rights in the same resource in some jurisdictions and not in others. This is resource gridlock cast upon the plane of geography, an absence of transjurisdictional coordination that hampers the unconsented use of the work throughout the world. It does not make unauthorized copying and distribution impossible, but it confines those activities to certain countries. In effect, it renders the public domain local and piecemeal—a patchwork or

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<sup>49</sup> See Berne Convention for the Protection of Literary and Artistic Works (Paris Text), art. 5(1), July 24, 1971, 828 U.N.T.S. 22 [hereinafter Berne Convention].

<sup>50</sup> *Id.* art. 7(8); see also Townsend Gard, *supra* note 9, at 704 (describing the rule of the shorter term).

<sup>51</sup> See 17 U.S.C. § 104(a), (c) (2012). For discussions of Berne's rule of the shorter term, sometimes called "comparison of terms," and the choice of the United States not to adopt it, see DAVID NIMMER, COPYRIGHT: SACRED TEXT, TECHNOLOGY, AND THE DMCA 65–66, 78–80 (2003); Townsend Gard, *supra* note 9, at 704.

<sup>52</sup> See NIMMER, *supra* note 51, at 79–80.

<sup>53</sup> See HELLER, *supra* note 14, at 26. The uncoordinated global public domain is not a new phenomenon. See WILLIAM BRIGGS, THE LAW OF INTERNATIONAL COPYRIGHT 546 (1906) (explaining that national copyright duration "is almost entirely an arbitrary matter, and the periods given vary considerably in the different countries").

checkerboard world commons.<sup>54</sup> A global public domain will not arrive for *Finnegans Wake* for nearly two more decades as a result of this transjurisdictional conflict of laws: a tragedy of the uncoordinated global commons.<sup>55</sup>

The inconsistent global commons that results from clashing national laws renders it difficult or impossible for users to aggregate and coordinate the conditions for unconstrained lawful cross-border dissemination of works, a problem that mirrors some of the effects of a sequential anticommmons.<sup>56</sup> Like the robber barons' tollbooths that sprang up along the Rhine River and hampered the flow of merchant trade during the Middle Ages,<sup>57</sup> today's patchwork public domain burdens the lawful dissemination of works, in effect erecting national copyright tollbooths along the global Internet highway.<sup>58</sup> Unlike a copyright anticommmons, however, this form of gridlock directly impacts the potential users of public goods rather than their owners. In this checkerboard commons, composed of alternating public-domain countries and private-ownership countries, the challenge concerns not so much the sheer length of copyrights as the inconsistency of national copyright rules. In the example of a copyright anticommmons discussed above, the source of underuse was multiple ownership interests created in an unpublished novel by the laws of a single country. In the example of *Finnegans Wake*, by contrast, the source of underuse takes the geographical form of multiple national laws that impede global dissemination. This uncoordinated commons thus poses a problem not of owners' gridlock but of users' paralysis. The problem is not uncooperative owners unable to aggregate decision-making under a single country's laws but rather willing users frustrated by mismatched national laws.

#### A. *The Disharmonizing Rule of the Shorter Term*

When a work's copyright has expired in its country of origin, it is natural for those who wish to make use of the work to wonder whether

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<sup>54</sup> See Hugenholtz & Okediji, *supra* note 34, at 7.

<sup>55</sup> The lack of international copyright harmony, despite legislators' claimed intentions, has been noted by many scholars. *E.g.*, Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 439–42 (2004).

<sup>56</sup> See HELLER, *supra* note 14, at 188 (discussing examples of a sequential anticommmons).

<sup>57</sup> See *id.* at 3–4, 20–21; see also MITCHELL, *supra* note 21, at 77–78 (offering an example of a sequential commons).

<sup>58</sup> Geo-blocking technologies may be used to confine Internet distribution to public-domain countries exclusively, but such a strategy only highlights the checkerboard nature of the global commons. See Jane C. Ginsburg, *International Issues: Which Country's Law Applies When Works are Made Available over the Internet?*, 34 COLUM. J.L. & ARTS 49, 53 (2010) (“[I]t might be desirable [for libraries making materials available over the Internet to] . . . block access from . . . [copyright] jurisdictions by anticipation. This approach is possible because one can slice and dice the Internet geographically.”).

they may distribute it in other countries where copyright terms are longer. Will those countries recognize the work's origin-country status and treat it as public-domain, or will they apply their own rules and deem the work to be protected? The Berne Convention's rule of the shorter term was adopted to provide solutions to such coordination problems.<sup>59</sup> The rule was fashioned, in part, to bring harmony to divergent copyright durations in the global market.<sup>60</sup> But if Berne's goal was to encourage worldwide application of a harmonizing rule, the goal has been eroded by competing policies. For example, member states of the European Union, which recognizes a general principle of non-discrimination among E.U. members, may not apply the rule in a way that "discriminates on the basis of a claimant's home law."<sup>61</sup> The language of certain E.U. harmonization directives also suggests that the rule of the shorter term should not be invoked as between E.U. member states.<sup>62</sup>

A recent dispute over unauthorized exploitation in Spain of works by the English writer G.K. Chesterton (1874-1936) illustrates the harmony-defeating approach to the rule of the shorter term in the European Union. A Spanish publishing house began issuing Chesterton's works in Spain after they had entered the public domain in the United Kingdom, the works' country of origin, at the end of 2006, seventy years after the author's death. For authors of Chesterton's vintage, however, the copyright term in Spain is the author's life plus eighty years.<sup>63</sup> The Spanish publisher evidently acted in the belief that Chesterton's works would be deemed unprotected in Spain, pursuant to the Berne Convention's rule of the shorter term. After lengthy litigation, the Spanish Supreme Court concluded that Chesterton's works, like

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<sup>59</sup> See *supra* notes 49–52 and accompanying text.

<sup>60</sup> See Elizabeth Townsend Gard, In the Trenches with § 104A: An Evaluation of the Parties' Arguments in *Golan v. Holder* as it Heads to the Supreme Court, 64 VAND. L. REV. EN BANC 199, 209–210 (2011) (noting that the rule was adopted to apply upward pressure on national copyright terms in the interests of international harmony); see also CONCISE EUROPEAN COPYRIGHT LAW 38 (Thomas Dreier et al. eds., 2006) (stating that the rule of the shorter term was intended to "mitigate" the problem of "the same work [being] protected in different countries for different periods of time"); cf. BRIGGS, *supra* note 53, at 320 (noting that the rule as originally adopted allowed countries to cease recognizing rights in a work "after the country of origin has shown, by terminating its own protection, that it considers the claims of the work to have been satisfied").

<sup>61</sup> See Paul Edward Geller, *Zombie and Once-Dead Works: Copyright Retroactivity after the E.C. Term Directive*, 18 ENT. & SPORTS LAW. 7, 9 (2000); see also CONCISE EUROPEAN COPYRIGHT LAW, *supra* note 60, at 38–39 (noting that the E.U. non-discrimination principle precludes application of the rule of the shorter term among E.U. members).

<sup>62</sup> See Directive 93/98/EEC, *supra* note 44 pmb1. ¶ 24 ("[C]omparison of terms should not result in Member States being brought into conflict with their international obligations."); see also Directive 2006/116/EC of the European Parliament and of the Council of 12 Dec. 2006 on the Term of Protection of Copyright and Certain Related Rights, pmb1. ¶ 23, 2006 O.J. (L. 372) (same) [hereinafter Directive 2006/116/EC].

<sup>63</sup> See Intellectual Property Law art. 6 (Jan. 10, 1879, no. 12, at 107) (Spain).

those of all authors who died between 1879 and 1986, were protected in Spain for eighty years after the author's death because the E.U.'s principle of non-discrimination prohibited application of the Berne rule to the prejudice of another E.U. member and its authors.<sup>64</sup> In effect, an uncoordinated public domain—with the Spanish copyright term exceeding other E.U. copyright terms by ten years—will continue to exist in the European Union for the works of many authors who died before 1987.<sup>65</sup>

The E.U. harmonization directives require E.U. countries to apply the rule of the shorter term to works of non-European origin,<sup>66</sup> but application of the rule can be unpredictable in that context as well. A recent copyright lawsuit over short stories by the American author J.D. Salinger (1919-2010) provides an illustration.<sup>67</sup> After concluding that three of Salinger's stories, published in the 1940s, had entered the U.S. public domain when their copyrights were not renewed pursuant to earlier U.S. renewal requirements,<sup>68</sup> a Tennessee publisher arranged to reprint the stories in the United States. The Salinger estate grudgingly conceded the propriety of U.S. publication but objected when it learned that the publisher had also made arrangements to issue the stories in translation in various countries of Europe.<sup>69</sup> In March 2015, the publisher filed a declaratory-judgment action in a Tennessee federal court, seeking judicial clarification that the stories were in the public domain in the European Union as a result of the Berne Convention's rule of the shorter term.<sup>70</sup> The publisher contended that because the stories were in the public domain in the United States—the country of origin—E.U. countries would apply the rule to disregard their own longer copyright terms (seventy or eighty years after Salinger's death)<sup>71</sup> and instead recognize the shorter U.S. term (twenty-eight years from the

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<sup>64</sup> See S.T.S., Apr. 13, 2015 (J.T.S., No. 177) (Spain), available at <http://kluwercopyrightblog.com/wp-content/uploads/sites/49/2015/05/Chesterton.pdf>.

<sup>65</sup> Spain's 1879 law was repealed in 1987 by a law that prospectively changed the copyright term to the author's life plus sixty years. See Intellectual Property Law art. 26 (B.O.E. Nov. 17, 1987). The 1987 law was in turn repealed after the E.U. harmonization directive required a term of the author's life plus seventy years. See *infra* notes 91–93 and accompanying text.

<sup>66</sup> See Directive 93/98/EEC, *supra* note 44, art. 7, Directive 2006/116/EC, *supra* note 62, art. 7, PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE § 8.3.3, at 298–99 (3d ed. 2013).

<sup>67</sup> See *Devault-Graves Agency LLC v. Salinger*, No. 2:2015cv02178-STA-tmp., 2015 WL 6143153 (W.D. Tenn. Oct. 19, 2015).

<sup>68</sup> See Copyright Act of 1909, Pub. L. No. 60-349, §§ 23–24, 35 Stat. 1075 (repealed 1978) (providing for an optional renewal copyright term of twenty-eight years after the initial twenty-eight-year term).

<sup>69</sup> Amended Declaratory Action & Complaint for Damages, ¶¶ 34–39, *Devault-Graves Agency LLC v. Salinger*, (No. 1:15cv-0458-JL), 2015 WL 6143153 (W.D. Tenn. Aug. 5, 2015).

<sup>70</sup> See Amended Declaratory Action & Complaint for Damages, ¶¶ 45–48, *Devault-Graves*, 2015 WL 6143153, at \*8–9.

<sup>71</sup> See *supra* notes 63–65; see also *infra* note 92 and accompanying text.



year of the stories' first publication, with no renewal term).<sup>72</sup>

In its motion to dismiss, the Salinger estate raised doubts about whether all E.U. countries would apply the rule of the shorter term to these facts. The estate argued that application of the rule, far from being automatic among Berne countries, often gives way to countervailing national principles that override the rule in a given country, including the country's interpretation of the rule and its Berne obligations, the country's own copyright laws, and any copyright treaties between the country and the origin country.<sup>73</sup> The estate attached to its motion a judgment it had recently obtained in which a German court ruled against the Tennessee publisher's German licensee and concluded that Salinger's three stories should not be treated to the rule of the shorter term in Germany.<sup>74</sup> In addition to noting that the stories still enjoyed protection under German law's interpretation of Berne, the German court held that a bilateral treaty of 1892, guaranteeing U.S. authors the same copyright treatment as German authors under German law, rendered the rule of the shorter term inapplicable to Salinger's three stories in Germany, despite their public-domain status in the United States.<sup>75</sup>

The Salinger estate also pointed to a recent case, *Warner Bros. Entertainment Italia v. Passworld*,<sup>76</sup> in which an Italian court refused to apply the rule of the shorter term to older American-made cartoons that had entered the U.S. public domain in the 1950s and 1960s for failure to meet copyright renewal requirements. First, the Italian court cited an 1892 U.S.-Italy copyright treaty that, according to the court, conferred protection on the cartoons in Italy and precluded the operation of the rule of the shorter term.<sup>77</sup> Second, the court ruled that Italian law would not apply the rule to works that had entered the public domain of their origin country as a result of that country's copyright formalities. Because the Berne Convention abolishes formalities (such as renewal)

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<sup>72</sup> See Amended Declaratory Action & Complaint for Damages, ¶¶ 44–49, *Devault-Graves*, 2015 WL 6143513, at \*8–9. For the renewal term, see Copyright Act of 1909, Pub. L. No. 60-349, §§ 23–24, 35 Stat. 1075 (repealed 1978).

<sup>73</sup> Memorandum of Law in Support of Defendants' Motion to Dismiss, at 10–16, *Devault-Graves*, 2015 WL 6143513 (W.D. Tenn. May 22, 2015). The court granted the defendants' motion with respect to lack of personal jurisdiction, denied the motion on all other issues, and transferred the action to the U.S. District for the District of New Hampshire for further proceedings. See *Devault-Graves*, 2015 WL 6143513 (W.D. Tenn. Oct. 19, 2015). The plaintiff later voluntarily dismissed the action. See Rule 41 Notice of Dismissal, *Devault-Graves*, 2015 WL 6143513 (D.N.H. Dec. 11, 2015).

<sup>74</sup> *Salinger v. Piper Verlag GmbH, Landgericht Berlin [BerLG] [Regional Court of Berlin]* Mar. 31, 2015 (Ger.).

<sup>75</sup> See *id.* at 10–11.

<sup>76</sup> See Trib. Milan, Judgment of the Court of First Instance of Milan, 6 Febbraio 2013, *Annali italiani di diritto d'autore, della culture e dello spettacolo* 901 (2013) (It.).

<sup>77</sup> See *id.* at 910.

as a condition of copyright protection,<sup>78</sup> Warner Brothers' failure to renew the cartoon copyrights, resulting in irreversible loss of protection in the United States, could not serve as a basis for applying the rule of the shorter term in Italy.<sup>79</sup> The court's implication was that Berne countries should not dignify the copyright-defeating formalities of other countries by applying the rule to those shorter terms, but instead should invoke, as an international corrective, a rule of national treatment that might not be applied had the copyrights expired in the origin country for reasons unrelated to formalities.<sup>80</sup>

These cases show that the rule of the shorter term is part of the tragedy of the uncoordinated global public domain. The rule is often a dead or moribund letter that offers little certainty for the prospective disseminator of a work whose copyright has terminated in its country of origin. As noted above, the United States sometimes does not apply the rule even when foreign works are in the public domain in their origin countries.<sup>81</sup> E.U. member states are prohibited from applying the shorter-term rule among themselves.<sup>82</sup> Courts in Berne countries may decide not to apply it to the public-domain works of other countries if any of a number of principles or policies counsel otherwise.<sup>83</sup> In short, application of the rule is far from lucid, uniform, and harmonizing in international contexts. Once again, we see tragic legal gridlock enacted on the stage of geography, a confusing array of interpretive principles that renders the rule of the shorter term a participant in the transjurisdictional muddle. Here, the disabling fragmentation of the world's commons is exacerbated by uncertainty about whether a work, already subject to conflicting national copyright terms, will be treated as protected or unprotected in a given country under the shorter-term rule.

### B. *Uncoordinated Subsidiary Copyright Rules*

The world's public domains can be fragmented from above or

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<sup>78</sup> See Berne Convention (Paris Text), art. 5(2), July 24, 1971, 828 U.N.T.S. 22.

<sup>79</sup> See *Warner Bros. Entm't Italia*, at 911; cf. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 17, 2009, Bull. civ. I, No. 07-21115 (Fr.), <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000021511566&fastReqId=1303403627&fastPos=1> (holding that the American film *His Girl Friday*, in the U.S. public domain for failure to renew the copyright, is protected in France pursuant to Berne's rejection of formalities as a basis for copyright protection).

<sup>80</sup> Because E.U. Directive 2006/116/EC, art. 7, and the Berne Convention, art. 18, refer to the termination of copyright in shorter-term countries as "expiry," it can be argued that those instruments do not interpret the loss of copyright through noncompliance with formalities as natural "expiry." See Dorothy Schrader, *Copyright Restoration for Public Domain Works*, in COPYRIGHT: CURRENT ISSUES AND LAWS 35 (John V. Martin ed., 2002) (noting the view that Berne's term "expiry" refers to "expiration of the full copyright term—not a term shortened by failure to satisfy a formality prohibited by [Berne]").

<sup>81</sup> See *supra* notes 49–52 and accompanying text.

<sup>82</sup> See *supra* notes 61–64 and accompanying text.

<sup>83</sup> See *supra* notes 66–80 and accompanying text.

from below. That is, regulatory disharmony can result either from laws that expand authors' protections without regard for global uniformity or from subsidiary copyright rules, such as user-benefiting limitations and exceptions to owners' rights, that are implemented by countries in a unilateral, uncoordinated manner. A notorious example of disharmonized subsidiary rules is the disparity between the fair use doctrine in the United States<sup>84</sup> and the fair dealing exception as codified and interpreted in the United Kingdom.<sup>85</sup> Fair dealing has typically permitted only certain enumerated uses, such as limited copying for research and study, criticism, review, and news reporting,<sup>86</sup> and often is held not to apply to unpublished works.<sup>87</sup> In contrast, the fair use provision in U.S. law prescribes an open-ended, multifactor test that may apply to any copyrightable subject matter and expressly permits reasonable uses of unpublished works.<sup>88</sup> Commentators have noted that fair use in the United States, which federal courts have interpreted broadly to cover many "transformative" purposes,<sup>89</sup> is inconsistent with more restrictive laws and international agreements that constrain judicial approaches in other countries.<sup>90</sup> A biographer whose quotation

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<sup>84</sup> See 17 U.S.C. § 107 (1976).

<sup>85</sup> See Copyright, Designs and Patents Act, 1988, c. 48, §§ 29–30 (Eng.).

<sup>86</sup> See *id.*; see also Lior Zemer, *Copyright Departures: The Fall of the Last Imperial Copyright Dominion and the Case of Fair Use*, 60 DEPAUL L. REV. 1051, 1071–72 (2011) (noting the "jurisdictional differences" between judicial interpretations based on fair use and those based on fair dealing, and "the difficulty with international harmonization of a workable toolkit for fair use incidents"). The U.K. copyright statute was recently amended to include fair dealing for purposes of caricature, parody, or pastiche, and for limited quotation from a work previously made available to the public. See The Copyright and Rights in Performances (Quotation and Parody) Regulations, 2014, SI 2014/2356, ¶¶ 3–5 (Eng.) (amending Copyright, Designs and Patents Act, 1988, c. 48, § 30 (Eng.)). Some nations, such as Israel, have adopted an open-ended, multifactor test for fair dealing that resembles the U.S. approach. See Copyright Act 2007, 5768–2007, 2007 LSI 34 (Isr.); see also Zemer, *supra* (discussing legislative revision of Israel's fair dealing law). In Canada, courts have recently applied the fair dealing statute in a flexible manner reminiscent of U.S. fair use. *E.g.*, *CCH Canadian Ltd. v. Law Soc'y of Upper Can.*, [2004] 1 S.C.R. 339, 379 (Can.), available at <http://scc-csc.lexum.com/scc-csc/scccsc/en/item/2125/index.do?r=AAAAA QATQ2FuYWRhIEV2aWRlbnNIEFjdAE>. While the Republic of Ireland has considered the adoption of "fair use" principles in its copyright law, the recommending committee stressed that the proposed revisions were "very circumspect" and "differ[ed] substantially from the US doctrine." MODERNISING COPYRIGHT: THE REPORT OF THE COPYRIGHT REVIEW COMM. 11 (2013), <http://www.cearta.ie/wp-content/uploads/2013/10/CRC-Report.pdf>.

<sup>87</sup> See PETER BALDWIN, *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE* 137–38 (2014); see also JENNIFER DAVIS, *INTELLECTUAL PROPERTY LAW* 61 (4th ed. 2012) ("It is generally held not to be fair dealing for an unpublished work to be the subject of public criticism or review . . .").

<sup>88</sup> See 17 U.S.C. § 107 (1976).

<sup>89</sup> See *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 578–80 (1994) (defining transformative use in fair use determinations); Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 818–39 (2015) (tracing the development of transformativeness in judicial fair use analysis).

<sup>90</sup> See Paul Edward Geller, *How to Practice Copyright Law Internationally in Perplexing Times?*, 60 J. COPYRIGHT SOC'Y U.S.A. 167, 175–76 (2013); cf. BALDWIN, *supra* note 87, at 312 (discussing the difference between U.S. fair use and the 2001 E.U. Information Society Directive,

of copyrighted material would be deemed a transformative fair use in the United States might have cause for concern that her work would be subject to a more stringent standard in the United Kingdom and other countries.

A striking example of uncoordinated subsidiary rules can be found in certain reliance-party exceptions that were adopted in Britain and the Republic of Ireland after a directive required E.U. countries to harmonize their copyright terms. In 1993, the Council of the European Communities issued a directive mandating harmonization of copyright terms throughout the European Economic Community for the benefit of authors and the first two generations of their descendants.<sup>91</sup> The directive required member countries to implement, by July 1, 1995, a term of protection equal to the life of the author plus seventy years.<sup>92</sup> This requirement of upward harmonization restored to copyright many works that had entered E.U. public domains after their previous term of the author's life plus fifty years had expired. Long-dead authors whose copyrights were revived included Arthur Conan Doyle, F. Scott Fitzgerald, Thomas Hardy, Rudyard Kipling, Edith Warton, Virginia Woolf, and James Joyce.<sup>93</sup>

Recognizing the impact that upward harmonization might have on individuals who had relied on the previous public-domain status of revived works, the directive's drafters permitted E.U. members to implement local exceptions for such reliance parties.<sup>94</sup> But the directive did not dictate the kinds of exceptions that might be adopted or require uniformity in their implementation. The United Kingdom, for example, adopted a number of exceptions that included a broad compulsory license for anyone wishing to make use of a work whose copyright had been revived by British legislation implementing the European Council's harmonization directive.<sup>95</sup> In 1997 the James Joyce estate, objecting to an unauthorized edition of the recently copyright-revived *Ulysses*,<sup>96</sup> sought a preliminary injunction in the English High Court

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which "was commonly interpreted to rule out [quotation from] unpublished works"); Trimble, *supra* note 29, at 346–47 (discussing variations among national exceptions for online posting of photographs of public sculpture).

<sup>91</sup> See Directive 93/98/EEC, *supra* note 44, pmb. ¶ 5.

<sup>92</sup> See *id.* art. 1.

<sup>93</sup> See Clive Reynard, *The Impact of the European Directive on Inexpensive Reprint Editions*, in *TEXTUAL MONOPOLIES: LITERARY COPYRIGHT AND THE PUBLIC DOMAIN* 45, 49–51 (Patrick Parrinder et al. eds., 1997).

<sup>94</sup> See Directive 93/98/EEC, *supra* note 44, pmb. ¶ 27.

<sup>95</sup> See Duration of Copyright and Rights in Performances Regulations 1995, SI 1995/3297, arts. 24–25 (Eng.). Article 23 exempts from liability, *inter alia*, any use of a revived-copyright work where the use was completed before the date of revival (July 1, 1995) or where arrangements for the use were completed before that date. See *id.* art. 23. The broad compulsory license in Articles 24 and 25 contains none of these limitations.

<sup>96</sup> See JAMES JOYCE, *ULYSSES: A READER'S EDITION* (Danis Rose ed., 1997) (originally published 1922).

against scholar Danis Rose who had prepared the edition, and the edition's publisher. The defendants were able to defeat some of the estate's claims by pointing to the British compulsory license.<sup>97</sup> That license eliminated the need for the estate's permission for most of the edition and required only that the publisher arrange for payment of a reasonable royalty on copies sold.<sup>98</sup>

The Republic of Ireland also adopted reliance-party exceptions to help ease the impact of revived copyrights. However, these exceptions did not include anything comparable to the compulsory license that existed under British law.<sup>99</sup> When the Joyce estate filed a similar action in Ireland in 2000,<sup>100</sup> the Irish High Court granted a preliminary injunction preventing an Irish university press from publishing extracts of Rose's *Ulysses* edition in an anthology of Irish writing.<sup>101</sup> The court ruled that factual questions as to whether the edition met the detailed requirements of the Irish reliance-party exceptions required a full hearing.<sup>102</sup> Thus, as a result of unharmonized national exceptions to the E.U. harmonization directive, a scholarly edition of *Ulysses* that had been conceived when that work lay in multiple E.U. public domains but not published until after the revival of its copyright there, was subjected to inconsistent judgments in Ireland and Britain.

This divergence between Ireland's and Britain's reliance-party provisions reveals a critical aspect of the fragmented global commons: Exceptions that are intended to lessen the impact of upward harmonization or other rights-enhancing legislation are sometimes rendered local by uncoordinated national implementation.<sup>103</sup> This is an

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<sup>97</sup> See *Sweeney v. MacMillan Publishers Ltd.* [2001] EWHC (Ch) 460 (Eng.), <http://www.bailii.org/ew/cases/EWHC/Ch/2001/460.html>.

<sup>98</sup> See *id.*

<sup>99</sup> See European Communities (Term of Protection of Copyright) Regulations 1995 (SI 158/1995) § 14 (Ir.). Section 14(b) exempts from liability, *inter alia*, any use of a revived-copyright work where the use was begun before the date of revival (July 1, 1995) or where substantial preparations for the use were made before that date, and where the user was unaware of or did not reasonably suspect the revival of the work's copyright. See *id.* § 14(b). No compulsory license for uses of revived-copyright works is provided for.

<sup>100</sup> See *Sweeney v. Nat'l Univ. of Ir. Cork* [2001] 1 ILRM 310 (H. Ct.) (Ir.), <http://www.bailii.org/ie/cases/IEHC/2000/70.html>.

<sup>101</sup> See *IRISH WRITING IN THE TWENTIETH CENTURY: A READER* (David Pierce ed., 2000).

<sup>102</sup> See *Sweeney v. Nat'l Univ. of Ir. Cork* [2001] 1 ILRM 310. Cork University Press decided to avoid further litigation and printed the anthology with the Joyce extracts omitted and a blank page inserted bearing the notice, "[p]ages 323–346 have been removed due to a dispute in relation to copyright." *IRISH WRITING IN THE TWENTIETH CENTURY*, *supra* note 101, at 323–46.

<sup>103</sup> For example, although the 2001 E.U. Information Society Directive (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, art. 5 2001 O.J. (L 167) (EC)) gave E.U. countries the option to enact limitations and exceptions to the directive, "[m]ost States have stuck to their national traditions—some allowing multiple and broad limitations, others only relatively few and narrow. This has left Europe with a patchwork of incompatible limitations and exceptions, causing legal uncertainty to the detriment of commercial providers of cross-border services, such as online music stores, and of cultural institutions, such as libraries,

erosion of the global public domain from below, a failure to coordinate commons-balancing subsidiary rules. While gridlock of the more familiar anticommons variety results from the difficulty of aggregating multiple ownership pieces within the same resource, this form of gridlock arises from multiple nations' failure to enact uniform exceptions that would allow users of a resource to avoid liability in international contexts.<sup>104</sup> On the one hand, users are confined to those countries that have enacted adequate exceptions and thus have too little geographic space in which to make robust use of works (a problem that resembles the effects of a spatial anticommons). On the other hand, users enjoy substandard and confusing privileges in the global context (a disability reminiscent of a legal anticommons).<sup>105</sup>

### C. *Sound Recordings in the United States*

Another kind of uncoordinated commons is localized within the United States. U.S. copyright law does not govern sound recordings created before February 15, 1972, but instead cedes protection of those works to “the common law or statutes of any State . . . until February 15, 2067.”<sup>106</sup> Thus, any pre-1972 sound recordings, including those of foreign origin, may be protected in the United States until 2067 in whatever manner the individual states prescribe.<sup>107</sup> These laws differ widely as to theory of liability and sometimes even duration of protection.<sup>108</sup> For example, a California statute provides that, in that state, the author of a pre-1972 sound recording “has an exclusive ownership therein until February 15, 2047.”<sup>109</sup> In contrast, New York

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archives and public broadcasters, offering content across European borders.” Hugenholtz & Okediji, *supra* note 34, at 27.

<sup>104</sup> “Differences in the nature of the transitional provisions adopted by each country [in response to the 1993 E.U. harmonization directive] are regrettable [and] produce further possible trade barriers within the European Economic Area.” Brad Sherman & Lionel Bently, *Balance and Harmony in the Duration of Copyright: The European Directive and its Consequences*, in *TEXTUAL MONOPOLIES: LITERARY COPYRIGHT AND THE PUBLIC DOMAIN* 15, 23 (Patrick Parrinder et al. eds., 1997).

<sup>105</sup> See HELLER, *supra* note 14, at 159–60 (discussing spatial and legal anticommons).

<sup>106</sup> 17 U.S.C. § 301(c) (1976).

<sup>107</sup> See *Capitol Records, Inc. v. Naxos of Am., Inc.*, 830 N.E.2d 250, 263–65 (N.Y. 2005) (holding that sound recordings originally fixed and now in the public domain in Britain are protected by New York common law until February 15, 2067); see also *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325, 344 (S.D.N.Y. 2014) (holding on summary judgment that under New York law, owners of common-law copyrights in pre-1972 sound recordings have an exclusive right of public performance).

<sup>108</sup> See Gary Pulsinelli, *Happy Together? The Uneasy Coexistence of Federal and State Protection for Sound Recordings*, 82 TENN. L. REV. 167, 169 (2014) (discussing the potentially disharmonizing impact on interstate commerce and broadcasting of a proposed Tennessee bill that would grant pre-1972 sound recordings the same protections that post-1972 sound recordings enjoy throughout the United States under federal copyright law).

<sup>109</sup> Cal. Civ. Code § 980(a)(2) (West 2015); see also *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, No. CV 13–5693 PSG, 2014 WL 4725382, at \*4 (C.D. Cal. Sept. 22, 2014) (citing Cal. Civ. Code § 980(a)(2) and the date of February 15, 2047, in describing the scope of rights granted to pre-

law protects the same sound recording for twenty years longer, until February 15, 2067.<sup>110</sup>

Courts of the various states are also free to adopt inconsistent definitions of “publication” for sound recordings—a critical concept for determining infringement liability—and may even conclude, as one court has done, that “the public sale of a sound recording otherwise unprotected by statutory copyright does not constitute a publication sufficient to divest the owner of common-law copyright protection.”<sup>111</sup> As Peter Jaszi and his colleagues have shown in their survey of ten states,<sup>112</sup> pre-1972 sound recordings enjoy conflicting protection under a variety of state criminal antipiracy statutes, civil statutes, and common-law doctrines of copyright, unfair competition, misappropriation, and conversion. Moreover, from state to state, there is little harmony among rules that provide exemptions and defenses for users.<sup>113</sup> Federal and state courts have even disagreed over whether federal safe harbors that limit infringement liability for Internet service providers<sup>114</sup> apply to pre-1972 sound recordings.<sup>115</sup>

Protection for pre-1972 sound recordings in the fifty states thus creates another form of regulatory gridlock: a dizzying array of mismatched laws, doctrines, and exemptions<sup>116</sup> that threatens to interfere with nationwide uses of these works.<sup>117</sup> This nationwide

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1972 sound recordings in California).

<sup>110</sup> See *Naxos*, 830 N.E.2d at 263.

<sup>111</sup> *Id.* at 264.

<sup>112</sup> See Peter Jaszi & Nick Lewis, *Protection for Pre-1972 Sound Recordings Under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis*, NAT'L RECORDING PRESERVATION BOARD (2009), <http://www.clir.org/pubs/reports/reports/pub146/contents.html>.

<sup>113</sup> See *id.* at 2–22.

<sup>114</sup> See 17 U.S.C. § 512 (2010).

<sup>115</sup> Compare *UMG Recordings, Inc. v. Escape Media Group, Inc.*, 964 N.Y.S.2d 106, 111–12 (N.Y. App. Div. 2013) (holding that the safe harbor under 17 U.S.C. § 512(c) does not apply to pre-1972 sound recordings), with *Capitol Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627, 640–42 (S.D.N.Y. 2011) (holding that the DMCA safe harbors apply to pre-1972 sound recordings).

<sup>116</sup> See P. Dylan Jensen, Note, *The Pre-1972 Sound Recordings Landscape: A Need for a Uniform Federal Copyright Scheme*, 38 HASTINGS COMM. & ENT L.J. 273, 275 (2016) (noting that “a web of varying state and common laws protect” pre-1972 sound recordings, “making it nearly impossible for rights holders and sound recording users to understand the scope of protection available”); see also Liu, *supra* note 28, at 1403 n.46 (describing inconsistent protection for pre-1972 sound recordings as “a patchwork of state laws”).

<sup>117</sup> See *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325, 352 (S.D.N.Y. 2014) (“[I]f different states adopt varying regulatory schemes for pre-1972 sound recordings, or if holders of common law copyrights insist on licensing performance rights on a state-by-state basis . . . it could upend the analog and digital broadcasting industries.”). A similar geographic muddle exists with respect to state publicity-rights laws that protect commercial use of names, likenesses, and images of deceased personalities. For example, New York does not recognize posthumous publicity rights at all. See N.Y. CIVIL RIGHTS LAW §§ 50, 51; *James v. Delilah Films, Inc.*, 144 Misc. 2d 374, 377–78 (N.Y. Sup. Ct. 1989). In Indiana and Oklahoma, publicity rights for deceased personalities subsist for 100 years after death. See IND. CODE § 32-36-1-8(a) (2016); OKLA. STAT. tit. 12, § 1448(G) (1998). Even Indiana’s and Oklahoma’s publicity rights differ

congestion has international implications. Just as with the confusing rule of the shorter term, a sound recording may have entered the public domain of its foreign country of origin (for example, Britain), yet may still be protected under state law in the United States,<sup>118</sup> thus falling victim to uncoordinated rules in both national and international contexts. Moreover, it is possible that a musical composition performed on a sound recording will have entered the U.S. public domain with the expiration of its federal copyright, while the sound recording that embodies the performance remains protected under the laws of some or many states.<sup>119</sup> Adding to the potential confusion, U.S. copyright law has restored federal copyright protection to certain pre-1972 foreign sound recordings, while leaving state-law protection untouched for pre-1972 U.S. sound recordings.<sup>120</sup> Sound recordings in the United States are thus subject to a “jigsaw puzzle”<sup>121</sup> of commons and private ownership, federal and state-law variations, and enigmatic rules applied to international contexts—a resource that is difficult for potential users to understand and exploit. The law of sound recordings is a geographical maze that offers a foretaste of the equally bewildering problem of the uncoordinated global public domain of unpublished works, to which I turn next.

## II. GLOBAL DISHARMONY AND THE UNPUBLISHED PUBLIC DOMAIN

The preceding Part highlighted three aspects of the uncoordinated public domain: the failure of the rule of the shorter term to harmonize copyright terms; the conflicts among subsidiary copyright rules purportedly created to benefit users of works; and the unassembled jigsaw puzzle of state laws governing sound recordings in the United States. In each case, legal disharmony, spread over multiple jurisdictions, impedes the efforts of users to make unauthorized use of works in global or multistate contexts. What multiple ownership rights in a single resource are to an anticommons, single ownership, distributed inconsistently over multiple jurisdictions, is to the uncoordinated public domain. The map of quarrelling laws hinders

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from each other in important respects. The scope of publicity rights in Indiana includes “gestures” and “mannerisms,” whereas Oklahoma’s publicity-rights statute does not mention these indicia of personality. *See* IND. CODE § 32-36-1-6. Moreover, Oklahoma’s statute does not protect personalities who died before 1936. *See* OKLA. STAT. tit. 12, § 1448(H) (1998). Indiana’s statute appears to contain no such limitation. Therefore, Oklahoma’s favorite son, Will Rogers, who died in 1935, receives publicity-rights protection in Indiana (including, presumably, protection for his famous mannerism of slouching and rubbing his chin), but none at all in his native state.

<sup>118</sup> *See* Capitol Records, Inc. v. Naxos of Am., Inc., 830 N.E.2d 250, 263–65 (N.Y. 2005).

<sup>119</sup> *See* Liu, *supra* note 28, at 1403 n.46.

<sup>120</sup> *See* 17 U.S.C. § 104A(h)(6)(C)(ii) (2002); Adam P. Segal, *Zombie Copyrights: Copyright Restoration Under the New § 104A of the Copyright Act*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 71, 83 (1997).

<sup>121</sup> *See* HELLER, *supra* note 14, at 176.



broad dissemination of an expressive resource, despite the availability of universal sharing technologies.<sup>122</sup> The checkerboard effect of national laws—a public-domain country here, a copyright country there—subjects resources such as novels, films, sound recordings, and artworks to underuse or obstruction, in the absence of often unforthcoming permissions from copyright owners.

The examples offered above, though diverse in subject matter, largely involved published works. The unpublished public domain, however, is particularly vulnerable to the paralyzing effects of the uncoordinated public domain.<sup>123</sup> This public domain is possibly the largest, though perhaps the least visible, cultural resource in existence. The quantity of materials collectively held in the world's institutional repositories is prodigious. For example, the Harry Ransom Center at the University of Texas at Austin contains more than forty-two million manuscripts, many of them never published before.<sup>124</sup> Cornell University's library boasts seventy million manuscripts.<sup>125</sup> The Beinecke Rare Book and Manuscript Library at Yale University houses several million manuscripts.<sup>126</sup> The British Library owns around 150 million items.<sup>127</sup> The National Archives and Records Administration claims to store "approximately 10 billion pages of textual records; 12 million maps, charts, and architectural and engineering drawings; 25 million still photographs and graphics; 24 million aerial photographs; 300,000 reels of motion picture film; 400,000 video and sound recordings; and 133 terabytes of electronic data."<sup>128</sup> These staggering numbers do not include the untold documents that exist in private hands.<sup>129</sup> In 2003, when copyrights of unpublished works created by

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<sup>122</sup> See Hugenholtz & Okediji, *supra* note 34, at 37–38 ("Digital networks ensure that creative works and knowledge goods are more easily, rapidly and efficiently distributed to diverse and large populations world-wide, assuring that welfare benefits from access and use of knowledge goods in one market will undoubtedly have important (and at times immediate) bearing on the value of other users in distant markets.").

<sup>123</sup> See Reese, *supra* note 8, at 611 ("[A]n unpublished work in the public domain in the United States may well remain protected by copyright law in other countries."); Townsend Gard, *supra* note 9, at 705 ("[T]here exists a great variance of the copyright terms for unpublished works [throughout the world]. . . . [U]npublished works seem to be in great disharmony.").

<sup>124</sup> See *The Manuscripts Collection*, HARRY RANSOM CENTER, <http://www.hrc.utexas.edu/collections/manuscripts/info/> (last visited Aug. 2, 2016).

<sup>125</sup> See Peter B. Hirtle, *Archives or Assets?*, 66 AM. ARCHIVIST 235, 235–36 (2003).

<sup>126</sup> See Christopher Klein, *Yale's Beinecke Rare Book and Manuscript Library turns 50*, BOSTON GLOBE (Apr. 7, 2013), <http://www.bostonglobe.com/lifestyle/travel/2013/04/06/yale-beinecke-rare-book-and-manuscript-library-turns/2Xq1xcawCc8rNBrouTEqM/story.html>.

<sup>127</sup> See *Collection Guides: Greek Manuscripts*, BRITISH LIBRARY, <http://www.bl.uk/collection-guides/greek-manuscripts> (last visited Aug. 2, 2016).

<sup>128</sup> *About the National Archives of the United States*, NATIONAL ARCHIVES, <http://www.archives.gov/publications/general-info-leaflets/1-about-archives.html> (last visited Aug. 2, 2016).

<sup>129</sup> Many important cultural documents are privately held and difficult to access. One scholar notes that "[m]any manuscripts related to [Sherlock] Holmes are in private collections. For example, in 2004, auction house Christie's sold a lot containing over 150 letters and cards from

authors anywhere in the world who died before 1933 terminated in the United States,<sup>130</sup> “probably the largest single deposit of material [entered] the [U.S.] public domain in history: every letter, journal, poem, short story, song, sketch, photograph, or painting that had never been publicly distributed and whose author died no later than 1932 [became available].”<sup>131</sup> Yet, as this Article shows, the contents of one nation’s public domain are not necessarily available for unfettered use in all nations. Legal disharmony ensures that many unpublished works will remain condemned to some degree of underuse in the global context.

The uncoordinated global public domain is vividly illustrated by a current scholarly project that has been organized to collect and publish the unpublished letters of James Joyce.<sup>132</sup> Most of Joyce’s posthumously published works, which include several collections of his letters, will enjoy copyright protection, in the United States at least, for many years to come.<sup>133</sup> However, copyrights in Joyce’s many unpublished letters, notes, and manuscripts expired in the United States<sup>134</sup> and many European countries<sup>135</sup> at the end of 2011, seventy years after his death. Nearly 2,000 unpublished letters by Joyce are known to exist in some fifty-nine repositories in ten countries.<sup>136</sup> Preparing this important collection requires the editors to locate the original letters, to obtain copies or make transcriptions of them, and to arrange, edit, and annotate them for eventual print and digital publication. For many years, the Joyce estate has adamantly refused to

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[Arthur] Conan Doyle to A.P. Watt to a private collector. . . . Since collections like these are privately, and often anonymously, owned, research here could go no further.” Cattleya M. Concepcion, *The Adventure of the Elusive Postcard*, 5 J.L.: PERIODICAL LABORATORY OF LEGAL SCHOLARSHIP 283, 288 (2015).

<sup>130</sup> See 17 U.S.C. § 303(a) (2010).

<sup>131</sup> Reese, *supra* note 8, at 586; see also Townsend Gard, *supra* note 9, at 688–91 (calling the 2003 legal change “an unimaginable expansion of the public domain”).

<sup>132</sup> I am one of four lead editors of this project, for which there is a contract with Oxford University Press. The others are William S. Brockman, Kevin J.H. Dettmar, and Michael Groden. I confine my observations to objective legal issues concerning the project and to the documented experiences of my coeditors.

<sup>133</sup> The three major published volumes of Joyce’s letters enjoy copyright protection in the United States for ninety-five years from the year of their first publication. See JAMES JOYCE, LETTERS OF JAMES JOYCE (Stuart Gilbert et al. eds., 1957–1966); 17 U.S.C. §§ 302, 304 (1998, 2002). Thus, these volumes will remain in copyright in the United States for decades to come. The copyright term for these same volumes differs in other countries. See, e.g., Copyright Act, R.S.C. 1985, c C-42, § 7(1) (Can.) (providing that copyright in a posthumously published literary work endures for fifty years from the end of the year of publication); see also Townsend Gard, *supra* note 9, at 706 (noting that the U.K. term for certain posthumous works is fifty years from the end of the year of publication).

<sup>134</sup> See 17 U.S.C. § 303(a) (2010).

<sup>135</sup> See Directive 93/98/EEC, *supra* note 44 art. 1.

<sup>136</sup> See *The Joyce Calendar: Published, Unpublished, and Ungathered Correspondence by James Joyce*, HARRY RANSOM CENTER, <http://norman.hrc.utexas.edu/jamesjoycechecklist/calendar.cfm> (last visited Oct. 3, 2016).

permit publication of any of Joyce's unpublished letters, citing family privacy and contending that private letters are irrelevant for understanding Joyce's creative gifts.<sup>137</sup> With the expiration of copyrights, the legal barriers to publication in the United States and Canada<sup>138</sup> have fallen. As currently planned, the print edition of the Joyce letters will be distributed in those two countries initially. Any digital editions will also be confined initially to those two countries by means of geo-blocking technology or other measures.<sup>139</sup>

This limited geographical scope is dictated by the uncoordinated global public domain for Joyce's unpublished works. The copyright laws of several key countries continue to impede unauthorized worldwide distribution of Joyce's unpublished writings. For example, his unpublished letters may not be exploited without authorization in Australia, where copyrights in unpublished works are perpetual.<sup>140</sup> Spain's copyright term for works by many earlier authors, including Joyce, is the author's life plus eighty years, not the author's life plus seventy years, as in the rest of the European Union.<sup>141</sup> Adding to this complexity, the copyright law of the Republic of Ireland is thought to be ambiguous about when, or indeed whether, copyrights terminate in unpublished works.<sup>142</sup> The largest obstacle to archive-based projects in

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<sup>137</sup> For the Joyce estate's efforts to protect what Joyce's grandson has called "the much abused privacy of the Joyce family," see Max, *supra* note 5, at 35–36 (internal quotation marks omitted).

<sup>138</sup> Copyrights in unpublished writings like those of Joyce had already expired in Canada by 2004. See Copyright Act, R.S.C. 1985, c C-42, § 7(4) (Can.); Reese, *supra* note 8, at 608–09; Townsend Gard, *supra* note 9, at 707.

<sup>139</sup> See Publishing Agreement between Oxford University Press and William S. Brockman, Kevin J.H. Dettmar, and Robert Spoo, Sept. 29, 2012 (on file with author).

<sup>140</sup> See *Copyright Act 1968* (Cth) s 33 ss 3 (Austl.) (providing that a literary, dramatic, or musical work not published or otherwise made available to the public before the author's death is protected for seventy years from the year in which the work is first published, performed, broadcast, or issued as recordings to the public); Reese, *supra* note 8, at 609; Townsend Gard, *supra* note 9, at 708.

<sup>141</sup> See *supra* notes 63–65, 92 and accompanying text.

<sup>142</sup> The Irish law states, "[t]he copyright in a literary, dramatic, musical or artistic work, or an original database shall expire seventy years after the death of the author, irrespective of the date on which the work is first lawfully made available to the public." Copyright and Related Rights Act 2000 (Act No. 28/2000) § 24 (Ir.), <http://www.irishstatutebook.ie/eli/2000/act/28/enacted/en/print>. This language might be read to mean that the seventy-year term does not begin to run until a work is made publicly available, rendering the copyright in an unpublished work potentially perpetual. This implication is strengthened by Section 9 of the First Schedule to Ireland's Copyright and Related Rights Act, 2000 (relating to Transitional Provisions and Savings). See Copyright and Related Rights Act 2000 (Act No. 28/2000) (Ir.), <http://www.irishstatutebook.ie/eli/2000/act/28/enacted/en/print>. In response to the need for reform and clarification of many aspects of Irish copyright law, including its treatment of unpublished works, the Minister for Jobs, Enterprise, and Innovation established a Copyright Review Committee in May 2011. The Committee recommended, among other changes, that Section 24 of the Copyright and Related Rights Act, 2000, and Section 9 of the First Schedule be revised to eliminate the "potentially (and unintentionally) . . . perpetual term of protection for works unpublished at the date of death of the author." See MODERNISING COPYRIGHT, *supra* note 86, at 35. Disclosure: As a Board member of the National Library of Ireland (NLI) at the time, I drafted, for submission to the Committee, proposed language for clarifying Section 24 and other

Europe, however, is the copyright law of the United Kingdom, which protects the unpublished writings of authors who died before 1969, such as Joyce, until 2039.<sup>143</sup> This striking departure from the rest of Europe, where Joyce's works mostly entered the public domain at the end of 2011, raises a significant barrier to disseminating his unpublished letters in England, Scotland, Wales, and Northern Ireland—collectively, one of the largest English-speaking markets in the world.<sup>144</sup>

The United Kingdom's 2039 rule has created a substantial gap in the European Community's purported goal of harmonizing the region's copyright terms. So disruptive has the rule become for cultural repositories and other constituencies that in 2013 Parliament granted the British Secretary of State powers to reduce the anomalous 2039 term for most unpublished works, including letters and other research materials, with the goal of simplifying U.K. copyright law and encouraging the publication of previously unpublished works.<sup>145</sup> During a consultation period, numerous organizations and individuals submitted their views on the proposed term-reduction. Many cultural institutions that collectively hold millions of unpublished works subject to the 2039 rule<sup>146</sup> urged the government to exercise its term-reducing powers. These institutions cited the negative impact of the rule on scholarly and curatorial uses, the orphan works problem, the rights clearance process, the objective of harmonizing copyright duration across the European Union, and other cultural concerns.<sup>147</sup>

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sections, on behalf of the NLI. As of this writing, Irish legislators have drafted but not yet enacted legislation based on the Review Committee's recommendations. See *Proposed Copyright Law to Improve Court Access and Create New Exemptions*, IRISH LEGAL NEWS (Aug. 5, 2016), <http://www.irishlegal.com/4985/proposed-copyright-law-to-improve-court-access-and-create-new-exemptions/#>.

<sup>143</sup> See Copyright, Designs and Patents Act 1988, c. 48, § 1, (12)(4) (Eng.) (amending Copyright Act 1956, c. 74, § 2 (3)); see also U.K. INTELLECTUAL PROPERTY OFFICIAL CONSULTATION ON REDUCING THE DURATION OF COPYRIGHT IN UNPUBLISHED ("2039") WORKS IN ACCORDANCE WITH SECTION 170(2) OF THE COPYRIGHT, DESIGNS AND PATENTS ACT 1988, at 4–5 (2014) (summarizing the 2039 rule); Reese, *supra* note 8, at 608; Townsend Gard, *supra* note 9, at 707, 710–12 (describing the international disharmonizing effects of the 2039 rule).

<sup>144</sup> See Townsend Gard, *supra* note 9, at 705 (describing the difficulty of publishing or distributing unpublished works in multiple countries where copyright laws may differ). It is true that the "litigation difficulties" of enforcing copyright laws in cross-border contexts may practically insulate many online infringing activities. See Trimble, *supra* note 29, at 390–401. However, the uncoordinated public domain creates serious *ex ante* problems for researchers who must deal with publishers, institutional repositories, and other gatekeepers.

<sup>145</sup> See Enterprise & Regulatory Reform Act 2013, c. 24, § 76(3) (Eng.) (amending the Copyright, Designs and Patents Act 1988); see also U.K. INTELLECTUAL PROPERTY OFFICIAL GOVERNMENT RESPONSE TO THE CONSULTATION ON REDUCING THE DURATION OF COPYRIGHT IN CERTAIN UNPUBLISHED WORKS 1 (2015) [hereinafter U.K. INTELLECTUAL PROPERTY OFFICIAL RESPONSE] (summarizing the term-reducing powers enacted by Parliament), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/399171/973\\_-\\_Government\\_Response\\_-\\_copyright\\_in\\_certain\\_unpublished\\_works.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399171/973_-_Government_Response_-_copyright_in_certain_unpublished_works.pdf).

<sup>146</sup> See U.K. INTELLECTUAL PROPERTY OFFICIAL RESPONSE, *supra* note 144, at 2.

<sup>147</sup> See *id.* at 2–3.

However, respondents who represented rights-holders argued that altering the 2039 rule would amount to a confiscation of property rights, depriving owners of income sources, licensing arrangements, and other benefits, possibly in violation of European human rights principles.<sup>148</sup> Other respondents expressed concern about the potential erosion of individual privacy in letters, diaries, and other materials not ostensibly created for publication.<sup>149</sup> As a result of these protests, and despite the many respondents who urged amendment of the rule, the British government concluded that legislation should not be made “without further consideration of the issues raised during the consultation,” and that discussions with “interested parties” would be arranged “to explore the possible direction of future work in this area.”<sup>150</sup> The consequence of this political tabling is that the 2039 rule remains an obstacle to many scholarly and institutional undertakings.

#### A. *Post-Copyright Copyrights in the European Union*

The 2039 rule is not the only barrier to archive-based projects in Europe. The same European Council directive that compelled the upward harmonization of copyright terms in the 1990s contained an additional provision:

Any person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work, shall benefit from a protection equivalent to the economic rights of the author [for] 25 years from the time when the work was first lawfully published or lawfully communicated to the public.<sup>151</sup>

Countries throughout the European Union were required to adopt this provision, which grants twenty-five years of economic copyright protection—that is, copyright without moral rights<sup>152</sup>—to any person who first lawfully publishes or makes available a work that has never before been published and whose copyright has expired.<sup>153</sup> On its face, this provision appears to create a kind of first-come-first-served monopoly. It was adopted as an incentive for making old, neglected works available for the first time and to reward the disseminator’s investment and sweat of the brow.<sup>154</sup> Although this provision shares

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<sup>148</sup> See *id.* at 4, 11.

<sup>149</sup> See *id.* at 8.

<sup>150</sup> *Id.* at 11.

<sup>151</sup> Directive 93/98/EEC, *supra* note 44 art. 4, 1993 O.J. (L 290) 9, 13 (EC).

<sup>152</sup> For a description of moral rights, see *infra* notes 196–199 and accompanying text. See also Reese, *supra* note 8, at 634 (noting that E.U. post-copyright rights “need not confer any moral rights protection”).

<sup>153</sup> See, e.g., Copyright and Related Rights Act 2000 (Act No. 28/2000) § 34 (Ir.).

<sup>154</sup> See MICHEL M. WALTER & SILKE VON LEWINSKI, EUROPEAN COPYRIGHT LAW: A COMMENTARY § 8.4.16, at 573 (2010).

features with other E.U. copyright revival rules,<sup>155</sup> there is a significant difference: An unpublished work no sooner enters the public domains of the European Union than it can be restored to copyright by the first industrious disseminator, not as an entitlement of the original author's estate, but as a new right vested in the disseminator.

These E.U. post-copyright copyrights create the possibility of an unseemly land-rush and additional rights-layered gridlock. Almost immediately after James Joyce's unpublished writings had entered the E.U. public domains, they became the subject of new copyright controversies. In February 2012, the *Irish Times* reported that Ithys Press, a small startup publisher based in Dublin, had announced the publication of a previously unpublished letter written by Joyce to his young grandson in 1936.<sup>156</sup> This illustrated volume, titled *The Cats of Copenhagen*, was offered for sale in editions priced at €1,200 and €300,<sup>157</sup> and was based on the original handwritten letter held in the collections of the Zürich James Joyce Foundation. The Foundation lost no time in complaining that it had been left "completely in the dark about the publication and that it never permitted, tolerated, condoned or connived in this publication."<sup>158</sup> Ithys Press made no attempt to deny that it had published the volume without seeking the Foundation's permission, or that it was proclaiming itself the claimant of a new twenty-five year E.U. copyright in the text of Joyce's letter.

Then, in early April 2012, The House of Breathings, another new entity based in the United States, announced that it was issuing *The Dublin Ulysses Papers*, a six-volume edition of previously unpublished Joyce materials that had been acquired by the National Library of Ireland (NLI) some years before at a cost of millions of euros.<sup>159</sup> The volumes could be obtained at prices between €75 and €200 each, the complete set for €800.<sup>160</sup> Danis Rose, the editor of the volumes, stated that he had taken it upon himself to publish the NLI's papers in order to forestall others who might capture the E.U. after-rights for themselves

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<sup>155</sup> See *supra* notes 91–93 and accompanying text.

<sup>156</sup> See Terence Killeen, *Joyce Children's Story Published in Dublin to Dismay in Zürich*, IRISH TIMES (Feb. 8, 2012), <http://www.irishtimes.com/news/joyce-children-s-story-published-in-dublin-to-dismay-in-z%C3%BCrich-1.459003>.

<sup>157</sup> See *THE CATS OF COPENHAGEN* James Joyce, ITHYS PRESS, <https://ithyspress.wordpress.com/titles/the-cats-of-copenhagen-james-joyce/> (last visited Dec. 5, 2016).

<sup>158</sup> Killeen, *supra* note 156 (quoting the Zürich James Joyce Foundation).

<sup>159</sup> See Press Release, National Library of Ireland's James Joyce 'Ulysses' Papers, Edited and Annotated by Danis Rose, Now Published in Six Volumes by House of Breathings (Apr. 4, 2012) (on file with Danis Rose), [http://joycemanuscriptsdublin.files.wordpress.com/2012/04/press-release\\_dublinulyssespapers\\_danisrose.pdf](http://joycemanuscriptsdublin.files.wordpress.com/2012/04/press-release_dublinulyssespapers_danisrose.pdf); Michael Groden, *The National Library of Ireland's New Joyce Manuscripts: An Outline and Archive Comparisons*, 14 JOYCE STUD. ANN. 5, 5 (2003) (noting that the NLI paid €12,600,000 for the Joyce manuscripts).

<sup>160</sup> See Terence Killeen, *Joyce Collection Published Free on Web*, IRISH TIMES (Apr. 12, 2012), <http://www.irishtimes.com/news/joyce-collection-published-free-on-web-1.499482>.

and engage in “restrictive” practices.<sup>161</sup> To show his good faith, he declared himself a temporary trustee of the new rights, which he held for the benefit of “[s]cholars, librarians, and artists,” and promised that he would conclude his trusteeship by “mak[ing] over to the Irish State” all such rights as he had acquired in the documents.<sup>162</sup> Rose had not obtained the permission of the NLI before announcing plans to publish these materials.

A few days after this announcement, the NLI placed on its public website numerous digital files containing images of most of the Joyce manuscripts that had been announced for *The Dublin Ulysses Papers*, along with other unpublished Joyce materials from its collections.<sup>163</sup> In doing so, the NLI was accelerating its plans for making the Joyce materials digitally available to the public.<sup>164</sup> Rose promptly responded in the press by charging that the NLI had infringed his “copyright,” adding that the NLI, in going forward with its online project, had in effect “rejected” his “proposed gift” of the newly acquired rights to Ireland.<sup>165</sup> Thus, in the space of a few months, unpublished Joyce documents had gone from being copyright-free throughout most of the European Union to being the subject of competing monopoly claims. Here was a true copyright anticommens<sup>166</sup> in which the NLI and Danis Rose both claimed post-copyright rights in the same resources throughout most of the European Union. This anticommens was compounded by an uncoordinated public domain inasmuch as the Joyce estate still enjoyed original author-based copyrights in those resources in the United Kingdom, Spain, and Australia,<sup>167</sup> though not in the United States,<sup>168</sup> Canada,<sup>169</sup> and Switzerland,<sup>170</sup> where Joyce’s unpublished writings had entered the public domain and were not

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<sup>161</sup> See Danis Rose, *Preface to The Dublin Ulysses Papers by James Joyce* (2012), <http://houseofbreathings.com/about/>.

<sup>162</sup> See *id.*

<sup>163</sup> See *More Service Enhancements*, NAT’L LIBR. OF IR., <http://www.nli.ie/en/list/latest-news.aspx?article=3f4bf22c-6dc8-4182-be71-4b09b9df84f2> (last visited Aug. 2, 2016); see also Killeen, *supra* note 160. The Zürich James Joyce Foundation has also made available free, high-quality online images of the letter from Joyce to his grandson that was published by Ithys Press. See *The Errant Copenhagen Letter*, ZÜRICH JAMES JOYCE FOUND., <http://www.joycefoundation.ch/site/jahnke-bequest-2/the-copenhagen-letter-3/> (last visited Oct. 3, 2016).

<sup>164</sup> As a NLI Board member, I participated in the decision to make the digitized Joyce materials available on the NLI’s website.

<sup>165</sup> Danis Rose, *A Question of Joyce Copyright* (letter to the editor), IRISH TIMES (Apr. 17, 2012), <http://www.irishtimes.com/opinion/letters/a-question-of-joyce-copyright-1.503145>.

<sup>166</sup> See *supra* notes 39–42 and accompanying text.

<sup>167</sup> See *supra* notes 140–143 and accompanying text.

<sup>168</sup> See *supra* note 134 and accompanying text.

<sup>169</sup> See *supra* note 138 and accompanying text.

<sup>170</sup> See WALTER & LEWINSKI, *supra* note 154, § 8.1.4, at 515 n.46 (noting that copyrights that had already expired in Switzerland pursuant to the term of the author’s life plus fifty years were not revived by new Swiss legislation in 1993 that amended the term to the author’s life plus seventy years).

subject to post-copyright revival of any kind.

These post-copyright copyrights raise various questions that find few answers in the present state of E.U. law. For example, what constitutes an act of “publication” or “making available” sufficient for acquiring the new right? Does a prospective announcement of plans to publish trigger the right?<sup>171</sup> Must first publication occur within the European Economic Area for the new right to be validly acquired?<sup>172</sup> How are conflicting claims of priority to be resolved? One reason that a term of years running from the author’s death has been so widely adopted as a formula for fixing the length of copyrights is that the publication-plus calculus can lead to disputes over when and whether publication actually occurred,<sup>173</sup> particularly when the Internet is the medium of distribution.<sup>174</sup> These first-come-first-served copyrights abandon this logic and make entitlements depend on elusive analog and digital release dates, publishers’ announcements and recordkeeping, and other disputable evidence of priority.

Moreover the question of who owns this new right is not settled in all E.U. jurisdictions.<sup>175</sup> Although the language of the harmonization directive appears to vest the right in the first person to disseminate, French law provides that the right belongs to the owners (“propriétaires”) of the manuscript (“oeuvre”) who bring about the publication or cause the publication to be made (“qui effectuent ou font effectuer la publication”).<sup>176</sup> This provision, which may partly reflect French law’s sensitivity to the moral right of divulgation,<sup>177</sup> seems to confine the right, at least in the first instance, to the owners of original manuscripts. In 1993, in a case involving certain unpublished

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<sup>171</sup> Irish law, at least, appears to require actual issuance of copies of the work to the public. *See* Copyright and Related Rights Act 2000 (Act No. 28/2000) § 40(1) (Ir.).

<sup>172</sup> British regulations plainly state that it must. *See* The Copyright and Related Rights Regulations 1996, SI 1996/2967, pt. II, ¶ 16(4)(a) (Eng.); *see also* WALTER & LEWINSKI, *supra* note 154, at 669–70 (describing the requirements for obtaining post-copyright rights in the United Kingdom); Reese, *supra* note 8, at 621 n.148 (noting that the provision for post-copyright rights “does not appear to apply if the work is first published outside of the European Economic Area”).

<sup>173</sup> *See* H.R. REP. NO. 1476, at 129–30 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5745–46 (discussing the “increasingly artificial and obscure” concept of publication as a means of marking the beginning of copyright terms). Some copyright terms are still measured from the year of publication. *See, e.g.*, 17 U.S.C. § 302(c) (1998) (providing that copyright terms for anonymous and pseudonymous works and for works made for hire endure for ninety-five years from the year of first publication).

<sup>174</sup> *See* Townsend Gard, *supra* note 9, at 698–701.

<sup>175</sup> *See* WALTER & LEWINSKI, *supra* note 154, § 8.4.25, at 577 (“[W]ith regard to the related right in posthumous works, initial ownership is not harmonized on the European level.”).

<sup>176</sup> CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. INTELL. PROP.] [INTELLECTUAL PROPERTY CODE] art. L. 123-4(3) (Fr.); *see also* WALTER & LEWINSKI, *supra* note 154, § 8.4.25, at 577 (“[O]wnership in posthumous works vests [under French law] in the proprietor of the ‘work’ (manuscript) . . .”).

<sup>177</sup> *See* BALDWIN, *supra* note 87, at 147–49 (discussing the development of the moral right of divulgation in France).



manuscripts of the nineteenth-century writer Jules Verne, a French court held that post-copyright rights belonged to the city of Nantes, which had acquired the original documents from Verne's heirs, and not to a biographer who had obtained copies and published their contents without securing the city's permission.<sup>178</sup>

The harmonization directive and various E.U. domestic laws also provide that to qualify for these after-rights, the disseminator must perform the act of publication "lawfully." Because the right applies only to works already in the public domain, the word "lawfully" can scarcely mean, without redundancy or contradiction, "with the consent of the author's estate." Some commentators believe that it means "with the consent of the owner of the manuscript."<sup>179</sup> In 2003, a German court ruled that publication by news outlets of photos of the recently unearthed Bronze Age Nebra Sky Disk, without the consent of the German state that owned the Disk, did not strip the state of its rights under German copyright law.<sup>180</sup> British regulations are explicit on this point. They state that a claimed post-copyright right is invalid if it is based on "an unauthorised act . . . done without the consent of the owner of the physical medium in which the work is embodied or on which it is recorded."<sup>181</sup> So, are these after-rights intended for finders or for owners? If for finders, does E.U. law jeopardize the massive investments of cultural repositories in unpublished documents and invite the claims of opportunists who have somehow obtained copies of those documents?<sup>182</sup> If for owners, does the law in effect collapse copyright law's hard-won distinction between tangible property and intangible rights, personalty and public goods?<sup>183</sup> Is this law the best

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<sup>178</sup> See Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 9, 1993, Bull. civ. I, No. 319 (Fr.), <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007031400&fastReqId=1005538594&fastPos=1>; see generally Suzanne Hovasse-Banget, *La Titularité des Droits de Publication Posthume Relatifs aux Oeuvres Inédites de Jules Verne*, 7 REVUE JURIDIQUE DE L'OUEST 317 (1994), [http://www.persee.fr/doc/juro\\_0990-1027\\_1994\\_num\\_7\\_3\\_2158](http://www.persee.fr/doc/juro_0990-1027_1994_num_7_3_2158) (discussing the legal points and implications of the Jules Verne case, and reproducing the text of the decision).

<sup>179</sup> WALTER & LEWINSKI, *supra* note 154, § 8.4.20, at 575 (citing authority); see also Reese, *supra* note 8, at 634 (discussing U.K. post-copyright rights).

<sup>180</sup> See *Himmelsscheibe von Nebra*, Landgericht Magdeburg [LG] [Magdeburg Regional Court] Oct. 16, 2003, 7 O 847/03 (Ger.), <https://www.telemedicus.info/urteile/Urheberrecht/Edition-princeps/626-LG-Magdeburg-Az-7-O-84703-Himmelsscheibe-von-Nebra.html>.

<sup>181</sup> Copyright and Related Rights Regulations 1996, SI 1996/2967, pt. II, ¶ 16(3) (Eng.). The Irish Copyright Review Committee recommended that Section 34 of the Republic of Ireland's Copyright and Related Rights Act, 2000, be amended to conform to British copyright regulations on this point. See MODERNISING COPYRIGHT, *supra* note 86, at 36.

<sup>182</sup> For a discussion of the challenges that E.U. post-copyright rights pose for cultural institutions, see PETER WIENAND ET AL., A GUIDE TO COPYRIGHT FOR MUSEUMS AND GALLERIES 70–75 (2000).

<sup>183</sup> See 17 U.S.C. § 202 (1976) ("Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.").

way to encourage institutions to make or allow productive use of their holdings? And is it efficient to parcel out the public domain to new owners in the absence of a method for alerting the public to the existence of such ownership claims?<sup>184</sup>

This sampling of puzzles shows, once again, that E.U. harmonization initiatives can be anything but harmonizing at the level of local implementation. When we step back to view the world's copyright map, we see dramatic disharmonies everywhere. A work may occupy the public domains of some or many countries, but it is often simultaneously protected by copyrights or moral rights in other countries. In still other countries, a work will have entered the public domain for a time and then be restored to protected status, with ownership vesting in the author's estate, a first disseminator, or in a cultural repository, depending on the governing law and the type of work involved.<sup>185</sup> In some cases the work may become the subject of true anticommons congestion as multiple claimants wrangle over E.U. post-copyright rights.<sup>186</sup> When the goal of distribution is worldwide and the technical means are available, as with the Joyce letters project and similar undertakings, local tragedies can become global ones. The ripple effects of local gridlock may impede global dissemination, even when a work is free of legal restrictions throughout much of the rest of the world.

Thus, a patchwork of divergent national laws has given rise to an uncoordinated public domain, potentially condemning Joyce's writings to years of tragic underuse. Joyce-related copyrights will remain an obstacle for the foreseeable future. That this may entail ongoing gridlock rather than a temporary check on the global public domain—true tragedy rather than mere transition<sup>187</sup>—is suggested by the unpredictability of E.U. post-copyright rights, which unforeseen claimants might assert at any time with respect to thousands of unpublished Joyce writings, creating a bewildering array of temporally staggered rights throughout the European Union and strewing the path of researchers with hazard and uncertainty.

### B. *Cultural Repositories, Moral Rights, and Fearful Norms*

Impeded distribution is one effect of the uncoordinated public domain, but the patchwork global commons creates yet another

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<sup>184</sup> See Reese, *supra* note 8, at 660 (noting that users may not be able to rely on the public-domain status of a work without investigating whether the post-copyright right has been acquired).

<sup>185</sup> See *supra* notes 171-184 and accompanying text.

<sup>186</sup> See *supra* notes 39-42, 166 and accompanying text.

<sup>187</sup> See HELLER, *supra* note 14, at 69-70; *cf.* Townsend Gard, *supra* note 9, at 706 (noting that transitional disharmony among some countries' copyright terms for unpublished works will end "in about fifty years").

obstacle, less visible perhaps to ordinary observers but no less frustrating for those engaged in archival research: library policies governing scholarly use of unpublished materials. Even after the copyrights in such materials have expired according to the laws of some or many countries, the policies and practices of cultural repositories, wherever situated, may make it difficult for users to access and obtain research copies of those materials.<sup>188</sup> Whether from a desire to generate revenue,<sup>189</sup> to safeguard authors' privacy,<sup>190</sup> or to avoid perceived legal dangers,<sup>191</sup> repositories sometimes refuse to allow access to or copying of such materials, even after the materials are no longer protected by copyright.<sup>192</sup> By continuing to privatize documents that have entered the legal public domain, repositories may jeopardize "the general archival mission of making the resources of the past accessible to the future," and effectively impose "quasi-copyright control" over uncopyrighted materials.<sup>193</sup> Because repositories are generally free to observe their own informal norms for access and copying,<sup>194</sup> they threaten to replicate or complicate the patterns of rule-fragmentation that already create legal gridlock in the public domain.<sup>195</sup>

Some French repositories, for example, bar both access to and copying of unpublished documents, and they do so even when those documents lack copyright protection in France. Copyrights in James Joyce's unpublished letters expired in France, as in much of the European Union, at the end of 2011.<sup>196</sup> But in France, moral rights exist

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<sup>188</sup> See Townsend Gard, *supra* note 9, at 711 ("[E]ven without copyright, [unpublished] papers may still be governed by other conditional access controls, and those who hold the papers will yield [*sic*] a great deal of power, regardless of their legal rights.").

<sup>189</sup> See Michelle Light, *Controlling Goods or Promoting the Public Good: Choices for Special Collections in the Marketplace*, 16 RBM: J. RARE BOOKS, MANUSCRIPTS, & CULTURAL HERITAGE, 48, 49–50, 56–57 (2015).

<sup>190</sup> See BIELSTEIN, *supra* note 30, at 9; Sara S. Hodson, *In Secret Kept, in Silence Sealed: Privacy in the Papers of Authors and Celebrities*, 67 AM. ARCHIVIST 194, 196–97 (2004).

<sup>191</sup> See *infra* notes 206–208 and accompanying text.

<sup>192</sup> See Reese, *supra* note 8, at 617–21. Sometimes contractual conditions insisted on by donors or sellers require repositories to limit access to or copying of uncopyrighted materials. See *id.* at 620–21; see also Lois More Overbeck, *Researching Literary Manuscripts: A Scholar's Perspective*, 56 AM. ARCHIVIST 62, 68 (1993) (urging archivists to cooperate with researchers and not to place "excessive restriction on copying that needlessly hampers productive and careful scholarship").

<sup>193</sup> See Hirtle, *supra* note 125, at 236, 240; cf. Jason Mazzone, *COPYFRAUD*, 81 N.Y.U. L. REV. 1026, 1056–57 (2006) (arguing that it is wrong for repositories to assert a copyright interest in materials in which they own only physical rights).

<sup>194</sup> See Mazzone, *supra* note 193, at 1055–56.

<sup>195</sup> See JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 119 (1999) (noting that "library practices vary enormously" in providing access to and copies of unpublished materials); see also *id.* at 199 (urging libraries and museums to "implement reasonable, identical basic rules for gifts [of cultural materials]" and to "enforce common policies on embargoes and access").

<sup>196</sup> See CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. INTELL. PROP.] [INTELLECTUAL PROPERTY CODE] art. L. 123-1 (Fr.).

perpetually and are descendible.<sup>197</sup> Moral rights, which protect authorial reputation and dignity and are distinct from the limited economic rights conferred by copyright law, include the right to be named the author of a work (attribution), the right against mutilation of the work (integrity), and the right to choose when and how to disclose the work to the public (divulgence).<sup>198</sup> Some French repositories have refused to allow scholars to obtain research copies of or even to view Joyce's letters without his estate's permission, citing the moral right of divulgence (*le droit de divulgation*)<sup>199</sup> that indefinitely protects Joyce's (that is, his heirs') prerogative to choose the conditions for disclosing his unpublished letters to the public, long after the copyrights have expired.<sup>200</sup> Moral rights "give [an author's] descendants especially powerful tools,"<sup>201</sup> and these rights pose serious obstacles to archival research and to public dissemination of materials.<sup>202</sup>

Whether a French repository is legally correct in extending the divulgence right to private consultation by researchers is not entirely clear,<sup>203</sup> but as a practical matter this prohibition turns the repository into an archival tomb when the consent of heirs cannot be obtained, except in rare cases in which a court might determine that an heir has committed notorious abuse (*abus notoire*) in using the divulgence right

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<sup>197</sup> See *id.* arts. L.L. 121-1–121-2.

<sup>198</sup> See Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, 9 IND. INT'L & COMP. L. REV. 423, 434, 447 (1999) (discussing the judicial origins of the French divulgence right); BALDWIN, *supra* note 87, at 28–37 (discussing the various moral rights); Reese, *supra* note 8, at 609–610 (discussing France's "apparently perpetual and descendible" divulgence right).

<sup>199</sup> See CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. INTELL. PROP.] [INTELLECTUAL PROPERTY CODE] art. L. 121-2 (Fr.).

<sup>200</sup> See, e.g., E-mail from Nathalie Fressard, Bibliothécaire assistante spécialisée, Bibliothèque littéraire Jacques Doucet, Paris, France, to Kevin J.H. Dettmar, W.M. Keck Professor of English, Pomona College (Feb. 5, 2015, 08:50 CST) (on file with author) (requiring estate permission for consulting Joyce's unpublished letters); E-mail from Laurence Le Bras, Service des manuscrits modernes et contemporains, Bibliothèque nationale de France, Paris, France, to Kevin J.H. Dettmar (Feb. 3, 2015, 09:26 PST) (on file with author) (stating that archival copies of Joyce's unpublished letters must be authorized by his estate, in light of moral rights). The Bibliothèque littéraire Jacques Doucet extends the requirement of estate-authorized consultation to all its manuscripts and letters. See *Services au public*, BIBLIOTHEQUE LITTERAIRE JACQUES DOUCET, <http://bljd.sorbonne.fr/Informations-pratiques/p8/Services-au-public> (last visited Aug. 2, 2016). The divulgence right has been described as "the most restrictive [of the French moral rights] for archives, and has aroused much anxiety regarding the meaning of the term divulgence in this context." CHRISTINE DE JOUX ET AL., *LES ARCHIVES PRIVÉES: MANUEL PRATIQUE ET JURIDIQUE* 161 (2008) (author's translation).

<sup>201</sup> Baldwin, *supra* note 87, at 38.

<sup>202</sup> See Ginsburg, *supra* note 58, at 50 ("[I]f a U.S. archive makes a letter by a French author accessible all over the world via the Internet, that author's French divulgence rights are violated, but so are they also in Germany, Spain and any other country that recognizes those rights.").

<sup>203</sup> See DE JOUX ET AL., *supra* note 200, at 161. At least one authority contends that, under French law, consultation of materials by an individual researcher in an archival reading room does not constitute divulgence in the sense of the Code De La Propriété Intellectuelle. See *id.*

to block access.<sup>204</sup> Notorious abuse is difficult to prove, because the litigant often must show that the heir's actions have been inconsistent with what the deceased author would have wished, even if the author never recorded her wishes or expressed a pertinent opinion.<sup>205</sup> The potentially eternal French divulgation right thus adds further fissures to the fragmented global commons. The expiration of French copyright in an unpublished work means little as long as the divulgation right threatens to bar archival access, research copies, and general publication and distribution, absent the consent of heirs who might prove resistant, unresponsive, or difficult to locate.

It is unclear how much the restrictive policies of repositories reflect reasonable interpretations of the law and how much they reflect subjective institutional norms. Both formal and informal norms may be operating when cautious interpretations of legal rules shape institutional practices.<sup>206</sup> When such interpretations reflect exaggerated caution, one might say that institutional practices are governed by fearful norms.<sup>207</sup>

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<sup>204</sup> See CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. INTELL. PROP.] [INTELLECTUAL PROPERTY CODE] art. L. 121-3 (Fr.); see also Jane C. Ginsburg, *Conflicts of Copyright Ownership Between Authors and Owners of Original Artworks: An Essay in Comparative and International Private Law*, 17 COLUM.-VLA J.L. & ARTS 395, 414–15 (1994) (discussing the divulgation right and the exception for notorious abuse). Recently, a planned edition of the unpublished letters of the French poet René Char to his mistress ran aground on the postmortem divulgation right. When the poet's widow, citing the divulgation right, objected to the edition, the editors sued her for committing abus notoire. The litigation ran through several appeals before the editors were finally enjoined from issuing their edition. See Louis Lefebvre, *René Char et le Droit de Divulgation Post Mortem*, REVUE GÉNÉRALE DU DROIT (Dec. 2014), <http://www.revuegeneraledudroit.eu/blog/2014/12/11/rene-char-et-le-droit-de-divulgation-post-mortem/> (discussing the Char case and other cases involving the divulgation right).

<sup>205</sup> See Lefebvre, *supra* note 204.

<sup>206</sup> See KENNETH D. CREWS, COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES: PROMOTING THE PROGRESS OF HIGHER EDUCATION 119–22 (1993) (discussing librarians' tendency to adopt strict policies regarding use of copyrighted works); cf. David R. Hansen et al., *Solving the Orphan Works Problem for the United States*, 37 COLUM. J.L. & ARTS 1, 10 (2013) (“[M]any libraries and archives forgo socially beneficial uses of orphan works because of an abundance of caution on the part of librarians and archivists who seek to avoid copyright infringement and litigation.”). Wide variations among international copyright laws governing library practices also contribute to global rule-fragmentation and disharmony for research projects. For an overview of these laws, see generally KENNETH D. CREWS, WIPO STANDING COMM. ON COPYRIGHT & RELATED RIGHTS, STUDY ON COPYRIGHT LIMITATIONS AND EXCEPTIONS FOR LIBRARIES AND ARCHIVES: UPDATED AND REVISED (2015).

<sup>207</sup> American repositories have applied widely varying policies to requests for photographic research copies of James Joyce's unpublished letters. The New York Public Library's Berg Collection refused to make or permit such copies of unpublished Joyce letters held in its archives, absent estate permission or special undertakings, despite the fact that the letters are in the public domain in the United States. To justify its refusal, the Berg Collection cited its concern that copyright in Joyce's unpublished letters still exists in certain European countries. See E-mail from Isaac Gewirtz, Curator, Berg Collection, to William S. Brockman (July 18, 2014, 16:11 EST) (on file with author). In contrast, the Fales Library at New York University promptly provided digital copies of its unpublished Joyce letters upon written request and payment of a modest fee, with no requirement of estate permission. See E-mail from Michael Groden, Distinguished University Professor Emeritus, Western Univ., to William S. Brockman (Mar. 2, 2015, 13:29 CST) (on file with author). Columbia University's Butler Library has adopted an even more liberal policy,

The danger is that fearful norms will further fragment the uncoordinated public domain by informally replicating and even exacerbating, on the level of private institutional decision-making, the general problem of legal gridlock and resource underuse. In such cases, fearful norms compound the “obstruction function”<sup>208</sup> of copyrights by preventing researchers from engaging in acts that may actually be permitted by the law. Moreover, isolated and unappealable decisions by cultural repositories may intensify the pronounced disparities that already exist in the legal treatment of moral rights among European nations<sup>209</sup> and other nations, such as the United States and the United Kingdom, where moral rights are recognized in more attenuated forms and for limited purposes.<sup>210</sup>

The problem is especially acute for projects that envision broad dissemination of materials sharing a common theme or subject matter, such as a particular author’s collected writings. As E.U. post-copyright rights show, uncoordinated acquisitions of rights can effectively atomize authors’ oeuvres, dispersing them among multiple private rights-holders and compounding the fragmentation effects of inconsistent national laws.<sup>211</sup> Analogous coordination problems arise when physical collections of authors’ manuscripts are offered for sale. The concern is that the dispersal of such papers or other unified collections among multiple private purchasers will make it difficult for researchers to locate and reassemble the scattered materials.<sup>212</sup> The pieces of private ownership that are distributed around the world cannot easily be gathered into accessible units that may be studied.<sup>213</sup> The

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relying on fair use and other exemptions to permit researchers to use their own cameras and other devices to make research copies of materials consulted on site, including unpublished Joyce letters. See E-mail from Karla Nielsen, Curator of Literature, Rare Book and Manuscript Library, Columbia Univ., Butler Library, to Robert Spoo (Aug. 9, 2016, 09:58 CST) (on file with author). Until 2004 or so, the Harry Ransom Humanities Research Center in Texas required permissions to be obtained before providing researchers with copies of copyrighted materials in its collections, despite specific exemptions under U.S. copyright law that authorize such copying. See 17 U.S.C. § 108(e) (2005). The Center has since conformed its policies to the law with respect to most research copies. See E-mail from Richard Oram, Associate Director, Harry Ransom Humanities Research Center, Univ. of Texas at Austin, to Robert Spoo (June 15, 2015, 15:56 CST) (on file with author).

<sup>208</sup> Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 148–49 (2011).

<sup>209</sup> See BALDWIN, *supra* note 87, at 313–14 (discussing European lack of agreement on moral rights).

<sup>210</sup> See *id.* at 230–40.

<sup>211</sup> See *supra* notes 151–185 and accompanying text.

<sup>212</sup> See SAX, *supra* note 195, at 148–49 (discussing the cultural problems arising from “[d]ispersal of important collections” by sale and auction).

<sup>213</sup> The varying practices of repositories regarding unpublished manuscripts mirror, on an institutional level, some of the access problems created by the dispersal of authors’ papers through private sales. See *supra* notes 188–210 and accompanying text. In the case of the Dead Sea Scrolls, both problems existed: the fear that discoverers would indiscriminately sell fragments of texts on the antiquities market, and that competition among multiple museums and

challenge posed by physical dispersal of an author's papers among private buyers is not unlike the problems created by the distribution of intangible authorial rights over discordant national copyright regimes.<sup>214</sup> In the first instance, consistent access to the papers is rendered difficult. In the latter instance, worldwide publication and distribution are thwarted.

In sum, the unpublished letters of James Joyce, who died more than seventy years ago, can be published without authorization in the United States and Canada, but not in Australia and not easily in Europe, where they are still protected by estate-held copyrights in Spain, the United Kingdom, and possibly Ireland, as well as by estate-held moral rights in France; and where, unpredictably, individuals and institutions might assert piecemeal claims based on EU post-copyright copyrights. Moreover, the rigid policies and fearful norms of some repositories make research-based copying and even archival access a challenge. The Joyce letters project, a long-overdue resource for studying one of the world's greatest writers, is a victim of the uncoordinated global commons. In a world of willing publishers and unlimited digital capability, the public domain for such projects remains a checkerboard of legal yeses and nos.

### III. APPROXIMATING GLOBAL HARMONY THROUGH COMPULSORY LICENSES

How can this tragedy be given a happy, or at least a happier, ending? How can the pieces of this patchwork public domain be gathered together to build a global market for researchers and users? Essentially, governments and legislators must devote the same care to the world's public domains as they have lavished on the world's copyrights. They must work to construct a unified global public domain, to harmonize downward, as it were, instead of always upward.<sup>215</sup> There are signs that this is possible. The recent attempt of the U.K.

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archives would hinder scholarship. See SAX, *supra* note 195, at 153–64.

<sup>214</sup> A striking example of a copyright-dispersed fictional character is Sherlock Holmes. The Holmes stories have entered the public domains of many countries, but ten of the stories remain protected by copyright in the United States until 2022. This uncoordinated public domain for Sherlock Holmes has resulted in litigation. See Elizabeth L. Rosenblatt, *The Adventure of the Shrinking Public Domain*, 86 U. COLO. L. REV. 561, 578–85 (2015).

<sup>215</sup> See SHELDON W. HALPERN & PHILLIP JOHNSON, *HARMONISING COPYRIGHT LAW AND DEALING WITH DISSONANCE: A FRAMEWORK FOR CONVERGENCE OF US AND EU LAW* 9 (2014) (“[S]uch moves toward [international copyright] harmonisation as have been adopted in the past, have, almost without exception, taken the form of treaties increasing the rights and protections of copyright owners, with limited parallel movement in the direction of uniform exceptions and limitations on those rights.”); see also BALDWIN, *supra* note 87, at 303–04 (discussing the “skyward” direction of international IP harmonization initiatives); Hugenholtz & Okediji, *supra* note 34, at 8 (arguing that “the continuous upgrading of authors’ rights [must be] balanced by an adequately defined and viable set of exceptions and limitations to copyright”).

government to amend the 2039 rule<sup>216</sup> shows that there occasionally exists political will, at least on a national level, to bring harmony to users' privileges. A rare multinational effort to achieve harmony for a particular group of users is found in the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled.<sup>217</sup> The efforts of various nations to enact orphan-works legislation are also hopeful signs.<sup>218</sup> The power of multilateral treaties and directives should be brought to bear on the problem of the patchwork global commons, just as it has been used to harmonize copyright terms and other aspects of international copyright law. To put this another way, the legislative efforts that have been made to eliminate national IP-law variations standing in the way of single-market uniformity for copyright owners<sup>219</sup> should be mirrored by efforts to harmonize the less visible global market for the activities of public-domain users.<sup>220</sup>

One approach would be to make creative use of compulsory licensing to approximate a unified public domain.<sup>221</sup> For example, if a

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<sup>216</sup> See *supra* notes 143–150 and accompanying text.

<sup>217</sup> See *Historic Treaty Adopted, Boosts Access to Books for Visually Impaired Persons Worldwide*, WORLD INTELL. PROP. ORG. (June 27, 2013), [http://www.wipo.int/pressroom/en/articles/2013/article\\_0017.html](http://www.wipo.int/pressroom/en/articles/2013/article_0017.html).

<sup>218</sup> See *supra* note 7 and accompanying text.

<sup>219</sup> See BALDWIN, *supra* note 87, at 304 (characterizing harmonization efforts as seeking to create a single, unified market for IP products in the European Union).

<sup>220</sup> Two general types of proposals have been advanced for solving the problem of conflicting national copyright laws, particular in the Internet context. The first calls for the adoption by national legislatures or other bodies of a single set of copyright law standards that would govern globally; the second argues for special conflict-of-laws rules that would require courts to select a single national copyright law (or a small number of national copyright laws) for resolving copyright disputes involving multiple national laws. See Trimble, *supra* note 29, at 349–90. For a proposal to harmonize U.S. copyright laws with those of the European Union, see generally HALPERN & JOHNSON, *supra* note 215; Hugenholtz & Okediji, *supra* note 34 (advancing a proposal for framing an international instrument on copyright limitations and exceptions within current treaty obligations); cf. Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75 (2000) (urging international adoption of an expansive fair use doctrine to further free trade and the public interest in global markets).

<sup>221</sup> The copyright law of India, on a national level, provides for compulsory licensing in circumstances where copyright owners unreasonably withhold previously published or performed works from the public, or where owners of copyrights in unpublished works cannot be located. See Copyright Act, 1957, §§ 31, 31A (India), <http://copyright.gov.in/documents/copyrightrules1957.pdf>; TAMALI SEN GUPTA, INTELLECTUAL PROPERTY LAW IN INDIA 27 (2011). In contrast to the broadly remedial objectives of my proposal, compulsory licenses, whether national or international in scope, typically permit much more limited uses of copyrighted works. See, e.g., Berne Convention (Paris Text), art. 13(1), July 24, 1971, 828 U.N.T.S. 22 (permitting Berne members to provide for compulsory licensing for sound recordings of musical compositions, with “equitable remuneration” to authors); see also *id.* art. 11bis(2) (compulsory licensing for broadcasting and rebroadcasting of authors' works), 17 U.S.C. § 111 (2014) (secondary cable transmissions), *id.* § 115 (sound recordings of nondramatic musical works), *id.* § 119 (2014) (secondary satellite transmissions). For an overview of recent scholarly proposals for the use of compulsory licenses and other liability rules to address copyright inefficiencies, mostly in the area of digital and Internet technologies, see Thomas B. Nachbar, *Rules and Standards in Copyright*, 52 HOUS. L. REV. 583, 585–88, 601–09 (2014).



work were in the public domain in Country A, the work's country of origin, but still protected in Country B, an international instrument could permit unconsented uses of the work in Country B to proceed, subject to a compulsory license. Users could exploit the work simply by giving notice to the rights-holder and offering to pay a reasonable use fee. The license would be compulsory in the sense that copyright owners would have no power to block uses.<sup>222</sup> Here, the compulsory license would essentially be doing the work of the rule of the shorter term, which, for various reasons of national or international policy, often fails to unify discrepant national copyright terms.<sup>223</sup> However, unlike the rule of the shorter term, which yokes discordant copyright regimes together by a kind of legal violence, a compulsory license would offer a more balanced compromise between the interests of users and rights-holders and, by providing reasonable compensation for uses, might escape such international strictures as the Berne/TRIPS three-step test for assessing the impact of user-oriented limitations and exceptions on the rights of copyright owners.<sup>224</sup> Just as with revived copyrights in the United Kingdom,<sup>225</sup> a treaty-based multinational compulsory license could help avert a users' market failure for the borderless, "a-territorial"<sup>226</sup> flow of public goods that would otherwise be subject to the gridlock of the world's inconsistent public domains.

In contrast to the rule of the shorter term, the compulsory-license system would have to be designed to overrule any inconsistent

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<sup>222</sup> A compulsory license is an example of a liability rule that gives claimants non-injunctive, monetary remedies only, in contrast to a property rule, which permits claimants to obtain injunctive relief. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092, 1106–1110 (1972); see also Salzberger, *supra* note 13, at 43–45 (discussing the potential "enhancement of the public domain" through the use of liability rules to compensate owners of informational goods).

<sup>223</sup> See *supra* notes 61–80 and accompanying text.

<sup>224</sup> See Berne Convention (Paris Text), art. 9(2), July 24, 1971, 828 U.N.T.S. 22 (providing that members may permit unauthorized reproduction of an author's work "[1] in certain special cases, provided that such reproduction [2] does not conflict with a normal exploitation of the work and [3] does not unreasonably prejudice the legitimate interests of the author"); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, art. 13, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (same); see also Hugenholtz & Okediji, *supra* note 34, at 7–8, 15–16 (characterizing compulsory licenses limiting authors' rights as "compensated limitations" that might satisfy the three-step test).

<sup>225</sup> See *supra* notes 95–98 and accompanying text. The U.K. compulsory license for use of revived-copyright works requires only that the user give reasonable notice of the intended use and offer a reasonable royalty or remuneration to the copyright owner. If a reasonable sum cannot be agreed upon, a Copyright Tribunal determines the license terms. Once the user has given reasonable notice, she is licensed, and the remuneration may be determined later. See Duration of Copyright and Rights in Performances Regulations 1995, SI 1995/3297, arts. 24–25 (Eng.). Similar rules could govern global commons-aggregating compulsory licenses, and an international tribunal could be established to resolve disputes over remuneration of copyright owners.

<sup>226</sup> Salzberger, *supra* note 13, at 51.

international principles, bilateral treaties, or national laws that would defeat the operation of such a world-harmonizing liability rule. Moreover, a stronger version of this proposed system might go further than simply creating a remunerative, commons-constructing rule of the shorter term. In the stronger version, if a work were in the public domains of some or many countries, though not the country of the work's origin, the compulsory license would make the work available in all countries without prior permission, again upon notice and the offer of a reasonable use fee. Such a global liability rule would be especially useful where copyrights linger on in a few outlier countries—such as the United Kingdom, Spain, and Australia in the case of James Joyce's unpublished letters<sup>227</sup>—and continue to create obstacles to unauthorized global dissemination.

In either the stronger or the weaker version of induced harmonization, an international compulsory-license system would play a role analogous to certain legal doctrines that preserve open access to important public resources despite the claims of discrete private owners. The infrastructure of the global public domain would thus benefit from a public-access rule akin to the navigable servitudes<sup>228</sup> and substantial-navigability doctrines<sup>229</sup> that historically have protected waterways from being impeded by private fisheries, and the prescriptive doctrines and customary rules that have kept roadways from being shut down by holdout landowners.<sup>230</sup> Without requiring copyright owners to surrender all the rights they enjoy in private-ownership countries, global compulsory licensing would recognize a kind of public-spirited duty on the part of owners to allow older materials of historical and cultural interest to be made available to broad sectors of the public.<sup>231</sup> Such a system would play for the uncoordinated commons a role similar to that of the single decision-maker who reconciles conflicting ownership rights in an anticommons.<sup>232</sup>

This scheme would permit a global public domain to be assembled, resource by resource and license by license, from the uncoordinated patchwork of national laws, just as solutions to anticommons problems take the form of aggregating fragments of

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<sup>227</sup> See *supra* notes 140–143 and accompanying text.

<sup>228</sup> See *United States v. Rands*, 389 U.S. 121, 123 (1967).

<sup>229</sup> See *R. v. Nikal*, [1996] 1 S.C.R. 1013 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1376/index.do>.

<sup>230</sup> See Carol M. Rose, *The Comedy of the Commons: Commerce, Custom, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 723–27, 749–50 (1986); see generally Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (inferring from diverse case law a public trust doctrine for addressing resource management problems impacting the public interest).

<sup>231</sup> Cf. SAX, *supra* note 195, at 65–68 (proposing a legal duty that would require private collectors to make artworks available for limited public access).

<sup>232</sup> See HELLER, *supra* note 14, at 151–52.

exclusive ownership in valuable resources.<sup>233</sup> Compulsory licensing would function in a manner not unlike the eminent-domain power, which permits a government to force the sale of real property at fair market prices when there is an important project, such as a public roadway, that requires the assembly of pieces of land controlled by owners who might hold out for prohibitively high prices.<sup>234</sup> This global public domain, assembled gradually from many compulsorily-licensed acts, would not be comprehensive, of course, but rather would come into existence in incremental, piecemeal fashion, triggered by the need of individual users to make worldwide use of particular works. User-selected unpublished works would serve as the catalyst for a growing, limited-purpose public domain; and works that had suffered from underuse would become the basis of a paying commons, remunerating owners and benefiting the public.

This licensed public domain<sup>235</sup> would be annexed to the actual public domain, a pay-as-you-go commons<sup>236</sup> coupled with the familiar anything-goes commons. Owners and users would each give up certain accustomed advantages. Owners would lose the ability to prohibit use in copyright countries, and users would forgo the traditional freedom of the commons and pay a reasonable fee for the privilege to exploit a

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<sup>233</sup> For example, the National Institutes of Health reformed its licensing guidelines to allow NIH-funded genomic research tools that are protected by exclusive patents to be licensed broadly and nonexclusively to promote academic research, with the result that “research institutions are creating, license by license, their own limited, royalty-free zone.” *See id.* at 62–63; *see also* Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 *SCI.* 698, 698–700 (1998) (describing the anticommons effects on biomedical research when too many owners hold upstream patent rights).

<sup>234</sup> *See* Rose, *supra* note 230, at 749–50.

<sup>235</sup> Another approximation of the public domain is the voluntary culture of IP sharing promoted by free software licenses and Creative Commons licenses, which have been likened to conservation easements whereby landowners, while still possessing real estate, voluntarily give up the ability to use it in ways that might harm the environment. *See* Molly Shaffer Van Houweling, *Cultural Environmentalism and the Constructed Commons*, 70 *LAW & CONTEMP. PROBS.* 23, 24–27 (2007); *see also* Michael J. Madison et al., *Constructing Commons in the Cultural Environment*, 95 *CORNELL L. REV.* 657 (2010) (discussing constructed commons for sharing and resource-pooling arrangements, such as patent pools, open source software projects, Wikipedia, and jamband communities).

<sup>236</sup> One type of pay-as-you-go commons is the *domaine public payant* (paying public domain) in which works whose copyrights have expired are granted further protection, either for a limited time or perpetually, but may be exploited without authorization under a kind of compulsory license or other levy, the revenues from which are not typically passed on to authors’ heirs but rather are used for various social and cultural purposes, such as supporting living authors. *See* WALTER & LEWINSKI, *supra* note 154, §§ 8.1.83–8.1.86, at 541–42; Carlos Mouchet, *Problems of the “Domaine Public Payant”*, 8 *COLUM. J. ART & L.* 138, 152–56 (1983). Argentina and Ghana currently employ versions of this system; other countries, such as the Czech Republic, adopted but later abandoned it. *See* Ana Santos Rutschman, *Steps Towards an Alignment of Intellectual Property in South-South Exchanges: A Return to TRIPS*, 43 *DENV. J. INT’L L. & POL’Y* 515, 549–53 nn.205–06 (2015). I am not proposing here that the entire public domain be reconstituted as a *domaine public payant*.

work throughout the world.<sup>237</sup> This two-tiered or hybrid public domain would have the signal virtue of being more navigable than the present fragmented public domain. Moreover, as works eventually shed their protection in copyright countries, those works would leave the pay-as-you-go commons and enter the anything-goes commons. For example, once James Joyce's copyrights had expired in the last copyright country, his writings could be said to have truly entered the global public domain.

Such a system would offer relief for much of the world's commons congestion, but it would not solve all problems. For example, European moral rights, which have resisted most efforts to harmonize IP laws,<sup>238</sup> would likely prove resistant to treaty-based compulsory licenses as well. Furthermore, since it would be aimed primarily at easing the transnational impact of disparate copyright durations, this scheme would do little to harmonize subsidiary user-oriented rules, such as fair use and fair dealing.<sup>239</sup> However, the E.U. post-copyright copyrights would fit comfortably within a compulsory-license system—perhaps on the tested model of the U.K. compulsory license for revived copyrights.<sup>240</sup> The E.U. after-rights might even be prospectively abolished or subjected to some other harmonization scheme that would reduce the threat of rights-grabs by opportunists who have obtained copies of original documents held by others, or by repositories more interested in controlling private assets than providing public access.<sup>241</sup> Some combination of these moderating initiatives might turn a tragedy of the unpublished public domain into a comedy,<sup>242</sup> or a tragicomedy,<sup>243</sup>

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<sup>237</sup> Cf. Mark Davison, *Database Protection: The Commodification of Information*, in *THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW* 167, 184 (Lucie Guibault et al. eds., 2006) (urging a “teleological” conception of the public domain that recognizes “a right to access privately owned information in a non-exclusionary manner such as via compulsory licenses”).

<sup>238</sup> See WALTER & LEWINSKI, *supra* note 154, §§ 16.0.22–16.0.23, at 1472–74.

<sup>239</sup> See *supra* notes 84–90 and accompanying text. Nor would this scheme address the disharmonized state laws governing sound recordings in the United States. See *supra* notes 106–121 and accompanying text.

<sup>240</sup> See *supra* notes 95–98, 225 and accompanying text. Another comparable compulsory license is the one that permits a party to continue to exploit a derivative work which the party created prior to the restoration of U.S. copyright in a foreign work. The license requires reasonable compensation for continued exploitation and provides that disputes over compensation will be resolved by an action in a U.S. District Court. See 17 U.S.C. § 104A(d)(3) (2002).

<sup>241</sup> See Hirtle, *supra* note 125, at 240 (noting that “[m]any repositories would like to maintain a kind of quasi-copyright-like control over the further use of materials in their holdings, comparable to the monopoly granted to the copyright owner”).

<sup>242</sup> The phrase “comedy of the commons” is used by Carol Rose to suggest a productive blending of commerce and open access in traditional collective activities, unconstrained by private ownership claims. See Rose, *supra* note 230, at 768–71. Though Rose discusses roadways, waterways, and other physical resources, her concept of an interactive commons may fruitfully be applied to public goods like intellectual property. See *id.* at 723.

<sup>243</sup> I use “tragicomedy” in the sense of “tragedy transcended,” a kind of plot found in certain dramas, including Shakespeare's, in which conflict is resolved and tragic possibilities are avoided

of the global copyright commons.

#### CONCLUSION

The global public domain is an uncoordinated commons. To speak of a unitary, worldwide public domain is to deal in abstraction. It would be more accurate to say that the global market contains many inconsistent public domains, or that the world's cultural commons incorporates many fragments of private ownership the size of nations. Nations enact copyright laws that conflict with the laws of other nations. These inconsistencies collectively generate global gridlock for scholars, researchers, hobbyists, and others: a regulatory tragedy for users and consumers. This gridlock results not so much from the actual prohibitions of copyright owners as from the crazy-quilt coexistence of commons and private ownership, spread inconsistently over multiple countries, that deters many uses or confines them to tragically local exercise. In this vast, unassembled jigsaw puzzle, a single unpublished resource may be public-domain in some countries, protected by copyright in others, subject to moral rights (despite expired copyright protection) in still others, and, in the European Union, potentially protected, even after copyrights have terminated, by new rights acquired randomly by first disseminators. The Internet and other forms of distribution continue to operate, but users are discouraged from making works widely available. The consequence is that researchers and the general public become victims of tragic underuse.

Attempts to impose international harmony on national copyright laws have not harmonized the world's public domains. Instead, such efforts have always left a fragmented commons. One possible solution would be to employ an international system of compulsory licenses, based on treaties or other instruments, that would permit unconsented use in countries where works were still protected by copyright despite having entered the public domain of their origin country or perhaps of other countries. Compulsory licenses would offer a middle way between complete forfeiture of owners' rights and continued obstruction of users' activities, and between actual repeal of discrepant national laws and the perpetuation of today's disharmonized world commons. Such an approach would not bring about a magical transformation of the world's copyright laws, but rather would create a mechanism for approximating global harmony from the particular needs of many individual users,

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in the end, as in the "resolution of revenge through forgiveness." See ERIC BENTLEY, *THE LIFE OF THE DRAMA* 318–19 (Applause Theatre Books 1991) (1964). Other legal scholars have used "tragicomedy" in a different sense to suggest a mixture of tragic and comic elements in the commons. *E.g.*, Brigham Daniels, *The Tragicomedy of the Commons*, 2014 BYU L. REV. 1347, 1355–56 (2014); A. Samuel Oddi, *The Tragicomedy of the Public Domain in Intellectual Property Law*, 25 HASTINGS COMM. & ENT. L.J. 1, 64 (2003).

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each user cutting a new pragmatic path through the bramble of the conflicted commons. This would be a constructed, pay-as-you-go commons, a bespoke public domain responsive to the demands of users, paid for by reasonable tolls that would help the traffic along instead of acting as dead-end property rules. Compulsory licensing, or a similar system of enlightened compromise, could thus bring functional coordination to the uncoordinated public domain.