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DISCIPLINING THE DEAD HAND OF COPYRIGHT: DURATIONAL LIMITS ON REMOTE CONTROL PROPERTY

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I. INTRODUCTION

This Article considers copyright as intellectual *property.* It focuses specifically on how copyright compares to other types of property on the dimension of time — that is, how long the exclusive rights associated with copyrights last compared with the exclusive rights associated with property rights in land and other tangible objects. Scholars and advocates exploring this comparison have noted that tangible property rights are potentially infinite in duration, while copyrights

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are constitutionally required to be for "limited times."[1] This characterization is ripe for refinement.

While the duration of copyright is theoretically limited, for many works it might as well be infinite. This is true, for example, for some so-called "orphan works" whose owners cannot be located. These works may be underused during their long copyrights.[2] If such underuse includes failure to preserve properly or duplicate existing copies of the works (fragile books or films, for example) then their use will also be effectively restricted even after the copyrights have expired.[3] Thus the duration of copyright's restrictions can be practically infinite, and yet tragically worthless in the long run to both lost copyright owners and society at large.[4] The possibility of infinitely frustrating copyrights should be particularly troubling to authors, for it is their intellectual legacies that stand to be lost when copyright dooms works to perpetual underuse.

The unintended consequences of ever-longer copyright terms are well documented.[5] A wide variety of proposals has been offered to address them — including ex ante durational limits,[6] more comprehensive recording to help keep track of copyright owners,[7] and time-

1. *E.g.*, Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 41 (2002); Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 WASH. U. L.Q. 417, 446–57 (2005).

2. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 15 (2006) ("Concerns have been raised that in such situations, a productive and beneficial use of the work is forestalled — not because the copyright owner has asserted his exclusive rights in the work, or because the user and owner cannot agree on the terms of a license — but merely because the user cannot locate the owner.").

3. For examples of these types of failures, see R. Anthony Reese, *What Copyright Owes the Future*, 50 HOUS. L. REV. 287, 292–97 (2012). Note that these are failures attributable to living copyright owners. In a thought-provoking article, Eva Subotnik has rejected the "dead hand" as a way of conceptualizing the problems attributable to long (specifically, postmortem) copyright duration, identifying the problem as suboptimal stewardship by the living. Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and the Postmortem Term*, 29 HARV. J.L. & TECH. 77, 118–24 (2015).

4. For elaboration and documentation of this point, see, for example, Megan L. Bibb, Note, *Applying Old Theories to New Problems: How Adverse Possession Can Help Solve the Orphan Works Crisis*, 12 VAND. J. ENT. & TECH. L. 149, 169–71 (2009).

5. For just a small sample of documentation and analysis of the orphan works problem, see, for example, JAMES BOYLE, THE PUBLIC DOMAIN 10–11, 203, 224, 237 (2008); David R. Hansen, et al., *Solving the Orphan Works Problem for the United States*, 37 COLUM. J.L. & ARTS 1 (2013); Lydia Palla Loren, *Abandoning the Orphans: An Open Access Approach to Hostage Works*, 27 BERKELEY TECH L.J. 1431 (2012); U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHTS (2015); U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 15 (2006); Jennifer M. Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 BERKELEY TECH. L.J. 1379 (2012).

6. *E.g.*, Derek Khanna, *Guarding Against Abuse: The Costs of Excessively Long Copyright Terms*, 23 COMMLAW CONSPECTUS 52 (2014).

7. *E.g.*, Public Domain Enhancement Act, H.R. 2061, 108th Cong. (2003); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003); Maria A. Pallante, *The Curious Case of Copyright Formalities*, 28 BERKELEY TECH. L.J. 1415, 1419 (2013).

sensitive application of doctrines like fair use.[8] But these proposals are often met with objections framed in terms of property rights, based on the assertion that tangible property rights are infinite and copyrights should be infinite as well (or at least as close to infinite as the Constitution's "limited times" language will bear).[9]

This logic is faulty[10] and its underlying premise is false. While the duration of rights to land and other tangible objects may be theoretically infinite, I will demonstrate below that a variety of limiting doctrines operate to terminate property rights when they threaten to prevent societally beneficial use of valuable resources. These doctrines offer models for grappling with the problems caused by copyrights that keep getting longer on the books, and even longer on the ground. They also help us think about the legacies left by the authors who are at the heart of copyright law. Ironically, long copyrights that produce dynasties for a few lucky copyright owners could destroy the intellectual legacies of the vast majority of authors.

II. PROPERTY, "INTELLECTUAL PROPERTY," AND TIME

The U.S. Constitution authorizes Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[11] This constitutional authorization for our federal copyright and patent laws is often referred to as the "Intellectual Property Clause."[12] Indeed, the term "intellectual property" is now ubiquitous in discussions about patent, copyright, and related fields of law. But the term is controversial.[13] Some scholars and advocates object to the term and to the notion it reflects — that the bodies of law

8. *E.g.*, Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 775 (2002); Joseph Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 410 (2002); *see also* Note, *Gone with the Wind Done Gone: "Re-Writing" and Fair Use*, 115 HARV. L. REV. 1193, 1196 (2002).

9. *See* Hughes, *supra* note 8, at 784–85 (citing examples).

10. *See* Peter Menell, *Governance of Intellectual Resources and Disintegration of Intellectual Property in the Digital Age*, 26 BERKELEY TECH. L.J. 1523, 1534 (2011) ("[D]evelopment of intellectual resources differs fundamentally from the development of tangible resources. Therefore, it cannot be assumed that intellectual resources should be governed by the same rules that have developed for tangible resources . . . .").

11. U.S. CONST. art. I, § 8, cl. 8.

12. *See, e.g.*, Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 26 (1994). On the history of the term "intellectual property," see Justin Hughes, *A Short History of "Intellectual Property" in Relation to Copyright*, 33 CARDOZO L. REV. 1293 (2012); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1033–34 (2005).

13. *See generally* Oskar Liivak & Eduardo M. Peñalver, *The Right Not To Use in Property and Patent Law*, 98 CORNELL L. REV. 1437, 1440–41 & nn.18–20 (2013) (citing commentary critiquing and embracing the idea of IP as property).

that give authors and inventors rights in their intellectual works share core characteristics with the bodies of law that give owners rights to land and physical objects.[14]

One oft-cited distinction between copyright and patent law on the one hand and the laws governing property in tangible things like land and chattels on the other is that copyright and patent law are subject to constitutional language constraining the duration of authors' and inventors' rights to only "limited Times."[15] To those skeptical of the notion of copyright and patent as forms of "property," this finite duration of authors' and inventors' rights is one of many ways in which those rights do not and should not operate like property. These skeptics point to the expansion in the duration of copyright as a way in which copyright is becoming more like tangible property and violating the spirit — if not the letter — of the constitutional limitation.[16] Conversely, some of those who most fully embrace the concept of intellectual *property* argue that copyrights and patents should — like other forms of property — last forever.[17] Indeed, congressional testimony leading up to the passage of the most recent extension of copyright duration made frequent reference to the perceived unfairness of copyright owners suffering from expiration of their rights when other property owners do not.[18]

On the debate about whether "intellectual property" is a useful category, my own view is that the law of tangible property can be an important source of insights about the benefits and costs of granting people rights to control the use of valuable resources, and about the various ways those rights and corresponding remedies can be structured. Copyright law, and the rest of the field that has come to be known as intellectual property, stands to gain from these insights. Some of the benefits and costs that characterize the in rem rights of

14. *E.g.*, Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 902 (1997) ("[T]he 'propertization' of intellectual property is a very bad idea."); Lemley, *supra* note 12, at 1069–71. *See also* JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK 46–72 (2008) (emphasizing the contrast between tangible property and patent); Menell, *supra* note 10 (arguing against a reflexive "carry-over" application of tangible property tools to govern intellectual resources).

15. *E.g.*, Bell & Parchomovsky, *supra* note 1, at 41; Sterk, *supra* note 1, at 446–57.

16. *E.g.*, Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1068 (2001) (lamenting that "though the founders never used that term, 'intellectual property,' . . . to us, copyright and patents are clearly property rights, and clearly deserve all the absolute and permanent protection that ordinary property deserves"); *cf.* Simon Stern, *From Author's Right to Property Right*, 62 U. TORONTO L.J. 29 (2012) ("[A]dvocates of heightened copyright protection find it hard to resist the analogy with tangible property when challenging the limited duration of copyright, and they find it hard to resist the analogies of theft and trespass when insisting that similarities in other works should be treated as infringements . . . . [I]t would be fair to say that the frequent appeal to property rights has played an important role in the developments of the last century and a half.").

17. *See* Hughes, *supra* note 8, at 784–85 (citing examples).

18. See examples cited below at notes 36–37 and accompanying text.

tangible property also characterize rights that attach to works of authorship and invention; some of the techniques that property law has developed over centuries to balance those costs and benefits may usefully be tailored for use in the IP context. Too often, though, what are offered as property lessons are no more than crude caricatures of property law and theory.[19] The debate about copyright duration is a case in point. Although some types of tangible property rights can, in theory, last forever, they can also be subject to durational limits that operate to cut short property interests against the wishes of their owners. And some property rights that attach to tangible resources cannot last forever — even in theory — because they are subject to mandatory, ex ante durational limits just as copyrights are.

This Article aims to document some of tangible property's durational limits, to explore the rationales for these limits, and to extract lessons to help us assess and improve copyright law on the important dimension of time.

III. COPYRIGHT DURATION AND ITS DISCONTENTS

Before turning to tangible property, this Part will briefly review the history of copyright duration under U.S. law, emphasizing how proponents of expanding copyright duration have used comparisons with tangible property to press their case.

Under England's 1710 Statute of Anne,[20] the first modern copyright statute, copyrights expired after fourteen years unless they were renewed by their authors for an additional fourteen-year term.[21] The U.S. Congress borrowed this (and much else) from the Statute of Anne in the Copyright Act of 1790, setting the initial term of copyright at fourteen years, with renewal possible if the author was still alive at the end of the initial term and complied with renewal formalities.[22] The 1831 revision of the Copyright Act extended the initial term from fourteen to twenty-eight years, following reform debates that enlisted analogies to tangible property.[23] The 1831 Act also elim-

19. For more nuanced accounts, see, for example, Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 145 (2004); Liivak & Peñalver, *supra* note 13; Menell, *supra* note 10, at 1523; Peter Menell, *Intellectual Property and the Property Rights Movement*, 30 REGULATION 36, 37 (2007–08).

20. 8 Anne, c. 19 (1710).

21. *Id.* ("Provided always, That after the Expiration of the said Term of 14 Years, the sole Right of Printing or Disposing of Copies shall return to the Authors thereof, if they are then Living, for another Term of 14 Years.").

22. Act of May 31, 1790, Ch. XV, 1 Stat. 124. *See generally* Barbara Ringer, *Renewal of Copyright*, Copyright Office Study No. 31, at 110 (1960) [hereinafter Renewal Report] ("An important innovation of the Act of 1790 was the establishment of renewal formalities.").

23. Act of Feb. 3, 1831, ch. XVI, §§ 2–3, 4 Stat. 436; Oren Bracha, *The Statute of Anne: An American Mythology*, 47 HOUS. L. REV. 877, 901–02 (2010) (describing pre-1831 reform arguments).

inated the requirement that the author survive the initial term in order for a fourteen-year renewal term to be possible; under the 1831 Act, the author's surviving widow and children were eligible to renew if the author was no longer living.[24]

Although the renewal provision was criticized starting in the 1890s[25] (and the dual-term system had already been abandoned in England and elsewhere in the 1800s[26]), Congress ultimately retained the dual-term structure in the 1909 Act, albeit with duration extended in several ways. The renewal term was lengthened from fourteen to twenty-eight years.[27] The Act also expanded the list of people who were eligible to renew if the author did not survive the initial term to include "the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin."[28] This provision was adopted over objections by publishers, who argued that expanding the renewal beneficiaries beyond widows and children would make it too difficult for publishers to negotiate — potentially with numerous and indeterminate next of kin — over rights to the renewal term.[29] As the Copyright Office later explained in its analysis of this history, "[i]f the deceased author had no surviving widow and children, Congress wanted the renewal to go to close relations or others who might have been dependent on the author for support or assistance . . . ."[30]

In 1976, the critiques of the renewal system (and pressure to comply with international practice under the Berne Convention) finally came to a head, and the dual-term system of protection was replaced with a unitary term lasting from creation of the work to the life of the author plus fifty years.[31] Representatives of authors advocated for this change, which both eliminated the necessity of renewal registration and lengthened the total term of protection available in most cases.[32] In 1998, Congress again extended the duration of copyright to last for the life of the author plus seventy years.[33] In ongoing negotia-

24. Act of Feb. 3, 1831, ch. XVI, § 2, 4 Stat. 436. *See also* Renewal Report, *supra* note 22, at 111.

25. *See* Renewal Report, supra note 22, at 112 and sources cited.

26. *See id.* at 110 regarding the English change in 1842.

27. Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, § 23, 35 Stat. 1075 (1909).

28. *Id.*

29. *See* Renewal Report, *supra* note 22, at 149–54 and sources cited.

30. *Id.* at 153. On the implications of this choice and its aftermath in the courts, see generally Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 594–95, 610–12 (2010).

31. Copyright Act of 1976, Pub. L. No. 94-553, § 304, 90 Stat. 2541.

32. *See* H.R. Rep. 94-1476 (noting that "the authors and their representatives stressed that the adoption of a life-plus-50 term was by far their most important legislative goal in copyright law revision").

33. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 101, 112 Stat. 2827 (1998).

tions over the Trans-Pacific Partnership, the United States Trade Representative is urging partner countries to adopt the same extension.[34]

Recent extensions of copyright duration have had to overcome opposition from skeptics who have pointed out that the changes are confusing, detrimental to the public domain, and unjustified by any likely incentive effect on creators.[35] On the other side of the debate, the legislative history of the most recent extension is replete with comparisons between copyrights and other types of property, with copyright owners and their advocates lamenting the perceived unfairness of cutting off the duration of copyright. For example, as he opened a 1995 Senate Judiciary Committee hearing on copyright term extension, Senator Orrin Hatch observed that: "Buildings, companies, farms, or other interests can stay in the family indefinitely. Only in intellectual property do we take the entire bundle of property rights from a property owner at a certain time to give a legacy to the culture at large, regardless of the wishes of the owner . . ."[36] Authors and their heirs testified about the unfairness of this disparity. A statement by the daughter of songwriter Milton Ager exemplifies this parade of complaints:

> [I]t appears to me monstrously unfair that the other recognized forms of property — lands, businesses, and so on — can be handed down indefinitely, so long as property taxes are paid, whereas the value of intellectual property under our present copyright laws arbitrarily is cut off 75 years after it was created.[37]

The 20-year extension of copyright terms that followed this and similar testimony may have been influenced by such appeals to the tangible property analogy. But in his dissent in *Eldred v. Ashcroft*, in which the majority upheld the constitutionality of the extension and its retroactive application, Justice Breyer noted the irony of this result: "the statute ended up creating a term so long that (were the vesting of 19th-century real property at issue) it would typically violate the traditional rule against perpetuities."[38] The majority disagreed with Justice Breyer's calculations, but not with his basic point: Owners of copyrights and other intellectual property subject to the "limited times"

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34. Trans-Pacific Partnership art. 18.63, Feb. 4, 2016.

35. *See generally* Kenneth D. Crews, *Copyright Duration and the Progressive Degeneration of a Constitutional Doctrine*, 55 SYRACUSE L. REV. 189, 210–14 (2004–05) (summarizing arguments).

36. *The Copyright Term Extension Act of 1995: Hearing on S. 383 Before the S. Comm. on the Judiciary*, Sept. 20, 1995, 104th Cong. 2 (1997).

37. *Id.* at 64–65.

38. *Eldred v. Ashcroft*, 537 U.S. 186, 256–57 (2003) (Breyer, J., dissenting).

constraint are not alone among property owners in suffering the expiration of their rights.[39] Hostility to perpetual rights appears in the Rule Against Perpetuities and throughout the law of property, especially with regard to "remote control" property — the topic to which this Article now turns.

IV. REMOTE CONTROL PROPERTY AND THE DEAD HAND

The allusions to the Rule Against Perpetuities in the *Eldred* opinions are exceptions. Typically, both sides in debates about copyright duration characterize the duration of property rights in tangible property as potentially limitless, overlooking the Rule Against Perpetuities and much more. On closer inspection, it is clear that there are many ways that the duration of property rights in tangible things is in fact limited.[40] This is especially common for property rights that — like intellectual property — allow their owners to exercise remote control over resources possessed by others.

In his 1908 concurrence in *White-Smith Music Publishing Company v. Apollo*, Justice Holmes characterized copyright as property — but property of this special, remote-control type:

> The notion of property starts, I suppose, from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is in vacuo, so to speak. It restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong. It is a right which could not be recognized or endured for more than a limited time, and therefore, I may remark in passing, it is one

39. *Id.* at 210 n.17 (2003).

40. *See* Sarah Harding, *Perpetual Property*, 61 FLA. L. REV. 285, 292–93 (2009); *see also* Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 N.W. L. REV. 1037, 1092 (2006).

> which hardly can be conceived except as a product of statute, as the authorities now agree.[41]

In drawing the contrast between copyright and paradigmatic possessory property rights in tangible objects, Justice Holmes here emphasizes the non-possessory, "in vacuo" nature of copyright and the way in which copyright owners can control strangers from afar, unconnected to any object possessed by the copyright owner. Copyright owners are thus unlike owners of possessory fee simple interests in land, whose rights to exclude generally impact the limited universe of people who come into contact with the physical boundaries of the owner's parcel.

Justice Holmes alludes to another apparent copyright anomaly: Although copyright owners are not necessarily possessors, the people whose spontaneity is restrained by copyright are typically in possession of tangible objects — books, sheet music, or other manifestations of the copyrighted work (including, today, digital copies on electronic devices). As to these tangible objects, copyright operates not as an instrument of freedom from interference for the possessor but rather the opposite: an instrument of constraint operated by strangers (copyright owners) via remote control. Copyright thus strikes Justice Holmes as an odd sort of property right in that instead of liberating people to use their possessions it "restrains [their] spontaneity . . . where but for it there would be nothing of any kind to hinder their doing as they saw fit."[42]

Copyright owners' power to control how remote strangers use objects in their possession is not as extraordinary as this passage suggests, however. Copyrights are similar in this regard to a whole set of property interests that give their owners the right to control use of land possessed by other people. This set includes servitudes such as easements, real covenants, and equitable servitudes. Think of a restrictive covenant that forbids commercial use of land in a residential neighborhood, for example. The set also includes future interests such as possibilities of reverter, rights of entry, and executory interests, which accompany defeasible fees simple and that become possessory when land is used in forbidden ways (or not used in required ways).[43] Consider the reversionary interest held by a grantor who grants land to the local school board "only so long as it is used for school purposes."

These types of non-possessory property rights have long been enforced by courts. Nonetheless, Justice Holmes' contention that proper-

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41. *White-Smith Music Pub. Co. v. Apollo Co*., 209 U.S. 1, 19 (1908) (Holmes, J., concurring).

42. *Id.*

43. *See generally* Gerald Korngold, *For Unifying Servitudes and Defeasible Fees: Property Law's Functional Equivalents*, 66 TEX. L. REV. 533 (1988).

ty rights with such features could only be the product of statute rings somewhat true. Judges have greeted most non-possessory property rights with suspicion and hemmed them in with doctrinal limitations — from servitude law's "touch and concern" requirement to rules of construction disfavoring forfeiture of defeasible fees. Frustrated property innovators have turned to state legislators to recognize additional forms.[44] Some legislatures have complied, creating new types of servitudes for purposes of environmental conservation and historic preservation, for example.[45] And legislators have stepped in to regulate long-standing forms as well, making contemporary non-possessory property rights largely products of statutes after all.[46]

In the passage from *White-Smith v. Apollo*, Justice Holmes also claims that because copyright is a non-possessory, "in vacuo," property right that exerts remote control over strangers, it "could not be recognized or endured for more than a limited time."[47] Here too, his observation is aptly applied to other forms of "remote control" property.

On the one hand, servitudes and future interests accompanying defeasible fees are designed to be durable, and thus to facilitate efficient long-term land use planning that would be difficult to accomplish through bilateral contractual measures alone. (Copyrights, too, are more durable than attempts to control copying of books by extracting express promises from each recipient of a copy.[48]) And yet, this durability can undermine efficiency when land use needs change and transaction costs make the restrictions difficult to renegotiate. Consider, for example, a residential use restriction imposed on a pocket of land hemmed in by noisy new highways. Because the likelihood of changed circumstances and of transactional difficulties increases with the passage of time, the durability of non-possessory property rights contributes to ambivalence about them.[49] The specter of "dead hand

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44. On judicial reluctance to recognize new property forms, see generally Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 17 (2000).

45. *See, e.g.*, California Conservation Easement Act of 1979, CAL. CIVIL CODE §§ 815–16. *See generally* UNIFORM LAW COMM'N, *Conservation Easement Act*, http://www.uniformlaws.org/Act.aspx?title=Conservation%20Easement%20Act [https://perma.cc/ZA2B-YDU8].

46. *See, e.g.*, GA. CODE ANN. § 44-5-59 (specifying the circumstances under which covenants will run with the land in Georgia).

47. *White-Smith Music Pub. Co. v. Apollo Co*., 209 U.S. 1, 19 (1908) (Holmes, J., concurring).

48. Contemporary mass market "agreements" imposed via click-wrap and other mechanisms that purport to attach to copies of intellectual works and thereby to establish privity of contract with whoever obtains possession of a copy are a different story. *See* Molly S. Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885 (2008).

49. *See generally id.*; *see also* Korngold, *supra* note 43, at 547–48; *cf.* Eric Rakowski, *The Future Reach of the Disembodied Will*, 4 POL. PHIL. & ECON. 91, 104–05 (2005). Julia Mahoney is an especially vocal critic of dead hand control. *See, e.g.*, Julia D. Mahoney, *The*

control" enforcing obsolete restrictions on living landowners and sacrificing socially beneficial use of resources thus explains much of the longstanding judicial hostility to enforcement of non-possessory property restrictions.

V. LIMITING THE DURATION OF REMOTE CONTROL PROPERTY

Although no constitutional "limited times" constraint applies to "non-intellectual" property rights, judges and legislators have nonetheless imposed a collection of durational limitations on non-possessory property rights attached to land.[50] Some of these limits (including some versions of the Rule Against Perpetuities) operate *ab initio* to invalidate non-possessory property rights that purport to be perpetual or potentially perpetual. Some serve as durational limits that cause property rights to expire automatically after a certain period of time. Some allow property owners to save their rights from automatic expiration only by recording them periodically.[51] Others operate ex post to extinguish property rights that have outlived their usefulness.[52] There remain theoretically perpetual non-possessory property rights, but they are vulnerable to invalidation on a number of different grounds related to dead hand control.[53]

The following Sections survey these duration-related limits on non-possessory property, demonstrating that copyright and other time-limited intellectual property rights are not as unique as they appear at first glance. Instead, the nature of non-possessory rights across tangible and intellectual property domains suggests that efforts to solve the problems caused by perpetual property are ubiquitous where rights are granted to owners who can exert remote control over resources possessed by others.

A. The Rule Against Perpetuities

For lawyers struggling to remember their first-year property classes, the first duration-related limit that likely comes to mind — perhaps murkily — is the Rule Against Perpetuities. In its classic common law formulation, the Rule invalidates contingent future inter-

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Illusion of Perpetuity and the Preservation of Privately Owned Lands, 44 NAT. RESOURCES J. 573 (2004); *see also* Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002).

50. *See generally* John A. Lovett, *Meditations on Strathclyde: Controlling Private Land Use Restrictions at the Crossroads of Legal Systems*, 36 SYRACUSE J. INT'L L. & COM. 1, 6 & n.17 (2008).

51. *See generally* Stewart Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 654 (1985).

52. See generally Bell & Parchomovsky, *supra* note 1, on dynamic property rights.

53. *See generally* Sterk, *supra* note 51, at 654.

ests that are not certain to vest or fail within the lifetime of someone alive at the time of their creation plus twenty-one years.[54] In the terminology introduced above, the Rule operates to destroy some potentially long-lasting remote control property rights that would impose constraints and uncertainty on other property rights. By removing these swords of Damocles if they might hang for too long, the Rule limits the time in which resources are subject to uncertainty and remote control.

In most states, the Rule Against Perpetuities has been modified from its classic formulation. In some states the rule has been abolished altogether. In other states, future interests of infinite duration can be created so long as the resources to which they apply are held in trust.[55] Reformers argue that the concerns about dead hand control that underlie the Rule do not apply in a modern economy in which most future interests attach not to unique tangible resources but to liquid and fungible money, stocks, etc.[56] But they do not deny that the interests to which the Rule has traditionally applied — long-lasting remote control property rights that interfere with vested interests in tangible resources — can be problematic if left entirely unchecked. Despite its recent decline, the Rule endures as an example of a duration-limiting doctrine responsive to that concern.

Even in its heyday, the Rule was not a satisfactory solution to the problem of long-lasting remote control property. The common law rule does not apply to servitudes or to future interests retained by the grantor, despite the fact that both of these categories of non-possessory property rights can restrain and unsettle possessory property interests for generations and generations.[57] And where it does apply, the complexity of the Rule itself throws both the future interests it might destroy and the vested interests it might save into a maze of

54. "No interest is good unless it must vest, if at all, not later than twenty-one years after the death of some life in being at the creation of the interest." JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

55. *See generally* Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2101–03 (2003). Critics of these reforms argue that they are no more than state legislatures' cynical attempts to lure trust companies to jurisdictions in which they can offer their wealthy clients tax-avoiding "dynasty trusts." *See, e.g.*, Jesse Dukeminer & James Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1314–15 (2013); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 359 (2005).

56. *E.g.*, Rakowski, supra note 49, at 105.

57. *See generally* Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV. 1867, 1907–08 (1986); Korngold, *supra* note 43, at 543.

legal uncertainty.[58] These shortcomings have contributed to movements to reform the Rule.[59]

Dissatisfaction with the Rule Against Perpetuities as a solution to the problem of long-lived remote control property rights resonates with the history of copyright duration. The dual term of protection and its requirement of both initial and renewal formalities was criticized for creating a "trap for the unwary."[60] That is, like the Rule, the complicated timing and paperwork requirements for copyright renewal caused deserving people to lose their rights due only to legal ineptitude.[61] In both the land and copyright contexts, concerns about needless complexity upending the expectations of hapless rights owners have motivated reform that has in general made it easier to maintain long-lived rights. The potential problems caused by these rights remain, however. The next Sections demonstrate how tangible property law continues to discipline these rights with durational limits somewhat more straightforward than the infamous Rule.

B. Ex Ante Durational Limits

Not all remote control property rights are subject to the Rule Against Perpetuities and its uniquely convoluted approach to long-lived contingent interests. Outside of the Rule's domain, state legislatures have enacted other types of durational limits. Laws of this type are not ubiquitous, but their existence and rationales resonate with a more universal concern about long-lasting remote control property and demonstrate that the imposition of ex ante limits on copyright duration is not a uniquely harsh limit on these rights, but rather a common mechanism of doctrinal discipline of remote control property.

When a grantor creates a defeasible fee simple and retains the future interest herself, that future interest — called either a possibility of reverter or a right of entry — is not subject to the Rule.[62] This has long been cited as one of the Rule's anomalies, rendering it frustratingly incomplete as a solution to the problem of dead hand control. Some states have recognized this anomaly and augmented the Rule

58. *See generally* W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 723 (1952) (complaining in a seminal critique about the "superfluous technicalities and complexities of the Rule").

59. *See generally* Dukeminer & Krier, *supra* note 55, at 1305–16 (2003) (providing chronology of reforms).

60. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 41 (2006).

61. *Id.* at 26 n.97 (citing legislative history of change to unified term in light of hardship caused by renewal system); *cf.* Leach, *supra* note 58, at 723 ("[O]ur courts in applying the Rule are not protecting the public welfare against the predatory rich but are imposing forfeitures upon some beneficiaries and awarding windfalls to others because some member of the legal profession has been inept.").

62. Dukeminier, *supra* note 57, at 1869, 1906 illus.31.

Against Perpetuities with statutory provisions that do subject possibilities of reverter and rights of entry to durational limits.[63] Unlike the Rule, these provisions do not typically ask when the future interest might vest. Instead, they simply destroy the future interest after a set period of time. If it has not already transformed from a future interest into a present possessory interest by that time, then the future interest owner takes nothing and the possessor's defeasible fee becomes a fee simple absolute.[64]

For example, in Maryland, possibilities of reverter and rights of entry created on or after the effective date of the statute are limited to thirty years from their creation.[65] This and related provisions emerged from a "Special Committee on Possibilities of Reverter and Rights of Entry," whose report explained why perpetual remote control property interests of this type are problematic:

> With the passage of time, the change of conditions in the restricted tract or in the neighborhood surrounding it, and the promulgation of government regulation, the usefulness of many [conditions or limitations creating defeasible fees] has completely vanished. . . . When such losses of utility occur, seriously undesirable consequences follow. The owner of the restricted land cannot use it or develop it to the greatest advantage. He cannot find buyers for it, because no one wishes to take his place in the strait jacket. In most instances it is not practicable to obtain releases of the restrictions because the owners of the restrictions are numerous and scattered. In other instances, the restriction owners may be few and available, but hungry for their pound of flesh.[66]

Nebraska law also limits possibilities of reverter and rights of entry to thirty years from the date of creation.[67] In upholding the statute

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63. *See generally id.* at 1907 ("In order to avoid such problems, a number of state statutes impose a fixed-year limit upon these interests, usually 30 years.").

64. *See generally* T.P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513, 559 (2003) (praising durational limits as superior to the Rule Against Perpetuities, because "[t]he use of a direct durational limit on future interests is far preferable to a rule against the remoteness of vesting. . . .") (citing Daniel M. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?*, 56 MICH. L. REV. 683 (1958) (Part I), 56 MICH. L. REV. 887 (1958) (Part II)).

65. MD. CODE ANN. REAL PROP. § 6-101 (c) (1981); *see also Arthur E. Selnick Assocs., Inc. v. Howard County Maryland*, 51 A.3d 76, 90–94 (Md. 2012).

66. Report of Special Committee on Possibilities of Reverter and Rights of Entry (quoted in *Knights and Ladies of Samaria v. Board of Educ. of Charles Cty.*, 688 A.2d 933 (Md. 1997)).

67. NEB. REV. STAT. § 76-2,102 (1981).

against a constitutional challenge, the Nebraska Supreme Court opined that "[t]he Legislature may reasonably have intended the reverter act to increase utility of land and marketability of titles by methods that were certain, uniform, and inexpensive."[68] A concurring justice elaborated:

> Possibilities of reverter or reentry when incorporated in real estate conveyances frequently, as in the case before us, extend over long periods of time and from generation to generation. As a result, the present-day owners of such possibilities often cannot be ascertained or located and it becomes impossible to obtain releases in the ordinary manner. In the meantime, the use of affected property is restricted, its merchantability is destroyed, improvement and development are prohibited, it may run afoul of zoning regulations, and an entire community may be detrimentally affected. . . . The benefits to be derived from the alleviation of such conditions, the correction of titles, and the restoration of affected properties to the market would appear to far outweigh the loss sustained by the individual holders of possibilities of reverter.[69]

Variations on these durational limits have been also been adopted in Illinois,[70] Connecticut,[71] Florida,[72] Maine,[73] Rhode Island,[74] Michigan,[75] and Kentucky.[76] And in states without statutes limiting the duration of restrictive future interests, courts sometimes impose "reasonable" time limits on conditions that purport to be perpetual.[77]

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68. *Hiddleston v. Neb. Jewish Ed. Soc.*, 186 Neb. 786, 791 (1971).

69. *Id.* (Newton, J., concurring).

70. ILL. COMP. STAT. ANN. 765/330-4 (1959).

71. CONN. GEN. STAT. ANN. § 45a-505.

72. FLA. STAT. ANN. § 689.18 (retroactive application invalidated by *Biltmore Village v. Royal*, 71 So.2d 727 (1954)).

73. ME. REV. STAT. ANN. tit. 33, § 103.

74. R.I. GEN. LAWS 1956, § 34-4-19.

75. MICH. COMP. LAWS. ANN. 554.62.

76. KY. REV. STAT. ANN. § 381.219; *see also Black Mountain Energy Corp. v. Bell County Bd. of Educ.*, 467 F.Supp.2d 715 (2006) (rejecting constitutional challenge to statute).

77. *E.g.*, *Forsgren v. Sollie*, 659 P.2d 1068, 1069 (Utah 1983) ("When an estate is conveyed on contingency (condition subsequent or determinable) and no time is specified for the contingency, the law will imply a reasonable time for the event."). *See generally* Korngold, *supra* note 43, at 546 n.74 ("Courts exhibit ambivalence about the antirestrictions policy in cases involving interpretation of a condition's duration. When no time limit is specified, some courts have held that negative restrictions must be fulfilled for only a reasonable time.").

Strict durational limits on servitudes are less common than limits on future interests. But a few states have enacted them, winning praise from some commentators.[78] In Minnesota, for example, "covenants, conditions, or restrictions" (with some exceptions) expire after thirty years.[79]

Note how akin the policy rationales for ex ante durational limits are to the concerns raised in contemporary debates about the consequences of copyright's long term. Maryland's lawmakers worried about landowners unable to use land to its greatest advantage just as the Copyright Office now worries about librarians and others whose "productive and beneficial use" of copyrighted works is forestalled by the orphan works problem.[80]

And yet, in current debates over whether our trade partners should be pressured to follow the lead of the United States and Europe and extend their copyrights to life plus seventy, proponents continue to deploy property rhetoric to suggest that ex ante limits are property law anomalies.[81] It should be clear by now that they are not. Instead, they are common features of property systems designed to limit the destructive potential of remote control rights.

C. Recording Requirements

The law of tangible property offers still more techniques for managing remote control rights over time. Many states impose recording and renewal requirements instead of, or in conjunction with, the types of durational limitations just discussed. In many states, these requirements are imposed by marketable title acts that apply to various types of clouds on title. These statutory provisions generally declare that a landowner whose chain of title goes back for a specified period of

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78. *See, e.g.*, Carol Rose, *Servitudes, Security and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403, 1413–16 (1982); Michael J.D. Sweeney, *The Changing Role of Private Land Restrictions: Reforming Servitude Law*, 64 FORDHAM L. REV. 661, 691 (1995); James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity,* 1989 WIS. L. REV. 1, 78.

79. MINN. STAT. ANN. § 500.20(2) (2002) ("all covenants, conditions, or restrictions . . . shall cease to be valid and operative 30 years after the date of the deed"); *see also Hiller v. County of Anoka*, 529 N.W.2d 426, 429 (Minn. App. 1995); *cf.* GA. CODE ANN. § 44-5-60(b). Despite an apparently strict statutory duration limitation, Georgia courts have enforced servitudes with automatic renewal provisions that render this limitation meaningless. *E.g.*, *Britt v. Albright*, 638 S.E.2d 372 (Ga. 2006); *Sweeney v. The Landings Assn.*, 595 S.E.2d 74 (Ga. 2004); *Turtle Cove Property Owner's Ass'n, Inc. v. Jasper County*, 566 S.E.2d 368 (Ga. 2002); *Bowman v. Walnut Mountain*, 553 S.E.2d 389 (Ga. 2001).

80. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 15 (2006).

81. *See* Eric Crampton, *Why Shouldn't Copyright Be Infinite*, ELEC. FRONTIER FOUND. (Sept. 1, 2015), https://www.eff.org/deeplinks/2015/08/why-shouldnt-copyright-be-infinite [https://perma.cc/53WX-GK7H] (discussing arguments in debate over extending copyright duration in New Zealand).

time (typically from twenty to forty years) has marketable title to that land free and clear of any contrary claims that have not been recorded during that period.[82]

Marketable title acts have been held to cut off both servitudes and future interests that have not been recorded within the specified period.[83] Some states make this more explicit, with statutory provisions separate from their general marketable title acts that expressly provide for the automatic expiration of servitudes or future interests unless they are periodically recorded. For instance, the Iowa "stale use statute" applies specifically to both future interests and servitudes that restrict the use of land.[84] The statute, originally enacted in 1966[85] and most recently amended in 2014,[86] limits the duration of land restrictions to twenty-one years from initial recording unless a claim to extend them is recorded before the expiration of those twenty-one years. In *Fjords North, Inc. v. Randy Hahn et al.*, the Iowa Supreme Court cited commentary explaining the rationale behind the statute's applicability to restrictive covenants: "'Covenants, especially neighborhood planning covenants, generating proprietary rights in equity frequently outlive their utility and if unlimited as to time, become mere clogs on title. . . . Limitations on land use running in perpetuity

82. *E.g.*, MICH. COMP. LAWS. ANN. § 565; N.C. GEN. STAT. ANN. §§ 47B-2, 47B-4; OHIO REV. CODE ANN. §§ 5301.497-55; WIS. STAT. ANN. § 893.33(6) (2007). *See generally* Uniform Law Commission, Marketable Title Act, Model Summary ("[The Uniform Marketable Title Act's] objective is to extinguish ancient interests that nobody asserts and limit the need to search title back to the earliest roots to assure title. Every piece of real estate currently held has root of title that extends back no more than 30 years. Whatever the records show to be the unbroken chain of title to a maximum of 30 years back — that is all that the current holder of the real estate or anybody who contemplates a transfer of real estate from the current holder has to worry about. Any interests that are not on the record as of that date 30 years back are automatically extinguished, with some limited exceptions. The hidden ancient interest is no more."). For a critique, *see generally* Walter E. Barnett, *Marketable Title Acts — Panacea or Pandemonium?*, 53 CORNELL L. REV. 45 (1967) (arguing that burden of recording is too onerous on multiple subdivision residents).

83. *See generally* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.16 (citing some cases extinguishing servitudes under marketable title acts and other cases applying exceptions); *see also Wichelman v. Messner*, 83 N.W.2d 800 (1957) (applying Minnesota law to a future interest attached to defeasible fee). The applicability of marketable title acts to servitudes and future interests is not always clear, however. When the current landowner's deed refers specifically to the use restriction at issue, for example, the restriction will not be cut off under some states' marketable title acts, despite not being recorded during the statutory period. *See generally* Comment, *Retroactive Termination of Burdens on Land Use*, 65 COLUM. L. REV. 1272, 1284 (1965). *But see Wichelman* 83 N.W.2d 800 (distinguishing and disparaging statutes with these exceptions).

84. IOWA CODE ANN. § 614.24; *see also Amana Soc'y v. Colony Inn, Inc.*, 315 N.W.2d 101, 111–13 (Iowa 1982).

85. *Compiano v. Jones*, 269 N.W.2d 459, 461 (1978).

86. IOWA CODE ANN. § 614.24(4).

may well become not only clogs on title, but clogs on alienation and utilization of land.'"[87]

Similarly, in Massachusetts, restrictive servitudes[88] with express durations of more than thirty years nonetheless automatically expire after thirty years unless they are recorded (with renewal recordation required every twenty years thereafter).[89] And California is among several states with recording requirements that apply specifically to reversionary future interests.[90]

Ironically, the rise of marketable title acts and similar recording and renewal requirements during the second half of the twentieth century coincided with the elimination of the renewal requirement in U.S. copyright law. But recognition of the unintended negative consequences of that shift have motivated calls to reinstitute some type of registration requirement as a prerequisite for long-lasting copyrights. For example, while serving as Register of Copyrights, Maria Pallante suggested that "a formal registration requirement near the end of term may be beneficial to the larger legal framework" of copyright.[91] The details of her proposal mirror the operation of some of the state law recording schemes just described: "Congress could shift the burden of the last twenty years of protection . . . from the user to the copyright owner, so that at least near the end of the term, the copyright owner would have to file with the Copyright Office as a condition of contin-

87. *Fjords North, Inc. v. Randy Hahn et al.*, 710 N.W.2d 731, 736 (Iowa, 2006) (quoting Arthur E. Ryman, Jr., *The Iowa "Stale Uses and Reversions Statute": Parameters and Constitutional Limitations*, 19 DRAKE L. REV. 56, 60–61 (1969)).

88. *See Labounty v. Vickers*, 352 Mass. 337 (1967).

89. 184 MASS. GEN. LAWS 27. This is in addition to the Massachusetts provision discussed above, which imposes a thirty-year limitation on any use restriction that does not specify its own duration.

90. Section 885.030 of California's civil code is an example of a duration-limiting recording requirement specific to reversionary future interests. Section 885.030 applies to "powers of termination," the term California uses for the reversionary future interests that are more typically referred to as rights of entry. The statutory commentary explains the existence of this special durational provision by noting that these future interests are not subject to California's Rule Against Perpetuities. Instead, their duration is governed by section 885.30, under which a power of termination that does not expressly provide for a shorter duration expires thirty years after the instrument creating it was initially recorded unless a notice of intent to preserve the interest is recorded within those first thirty years. CAL. CIV. CODE § 885.020, Law Revision Commission Comments ("Section 885.030 provides for expiration of a power of termination after 30 years, notwithstanding a longer or indefinite period provided in the instrument reserving the power. The expiration period supplements the rule against perpetuities. The rule against perpetuities does not apply to reversionary powers of termination."). If a timely notice is recorded, the duration is extended for thirty years from that recording (and can be extended again by a renewed recording within those thirty years and so on ad infinitum). CAL. CIV. CODE § 885.030. Similarly, section 345 of New York's Real Property Law cuts off rights of entry and possibilities of reverter after thirty years unless recorded and then renewed every ten years thereafter. N.Y. Real Prop. Law § 345 (thirty years with ten-year renewal periods, limited to rights of entry and possibilities of reverter).

91. Pallante, *supra* note 7, at 1419.

ued protection. Otherwise, the work would enter the public domain."[92] Pallante's suggestion echoes other proposals to fix copyright by "reformalizing" it to some extent.[93] What the preceding section suggests is that imposing formal requirements that help to justify and track long-lasting remote control rights would not only restore some advantages of historical copyright practice, but also unite copyright with the law that helps to discipline similar rights attached to land. And in the twenty-first century, technology might ease the process of complying with formal requirements, thus avoiding the traps and travails of the earlier era.

D. Ex Post Termination of Obsolete Interests

In addition to ex ante durational limits that set a pre-determined expiration date for restrictive future interests and servitudes or impose an expiration date on those that have not been property recorded, there are also both common law doctrines and state statutory provisions that operate ex post to terminate non-possessory use restrictions once they have outlived their usefulness.[94] Underlying these ex post termination rules is the idea that circumstances may change in the years following imposition of a restriction in ways that render what was once a beneficial land-use control into an unjustifiable hindrance that is nonetheless difficult to remove through voluntary negotiations. In the case of servitudes, the relevant doctrine transparently reflects this logic: Restrictive servitudes can be terminated (or modified, or enforced only with damages as opposed to injunctions) due to "changed conditions."[95] And as the Ninth Circuit put it, "[t]he doctrine of changed conditions operates to prevent the perpetuation of inequitable and oppressive restrictions on land use and development that would merely harass or injure one party without benefiting the other."[96]

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92. *Id.*

93. On imposing prerequisites for extended duration, see Public Domain Enhancement Act, H.R. 2061, 108th Cong. (2003); James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167, 227 (2005); Landes & Posner, *supra* note 7, at 471. On reformalizing copyright, see generally Christopher Sprigman, *Reform(aliz)ing Copyright Law*, 57 STAN. L. REV. 485, 500–01 (2004) and the proceedings of the 2013 Berkeley Law Symposium on Reform(aliz)ing Copyright for the Internet Age, 28 BERKELEY TECH. L.J. 1415–622 (2013).

94. *See generally* Korngold, *supra* note 43, at 557–58.

95. *See generally El Di, Inc. v. Town of Bethany Beach*, 477 A.2d 1066 (Del. 1984) (holding that the application of a restrictive covenant that prohibited the sale of alcohol in part of town was inequitable as a result of changed conditions); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.10 (2000) ("Modification and Termination of a Servitude Because of Changed Conditions"); Sterk, *supra* note 51, at 652–63; *see also* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.13 (2000).

96. *Cortese v. United States*, 782 F.2d 845, 850–51 (9th Cir. 1986).

There is not a similarly well-established judicial changed conditions doctrine for restrictive future interests.[97] But there is a well-established tradition of construing conditional language in old grants in ways that eventually release land from conditions that make little sense in the current environment.[98]

In addition to the changed circumstances doctrine for restrictive servitudes and judicial practices of construing restrictive future interests, some state legislatures have enacted provisions that direct courts to consider whether future interests have stood the test of time.[99] Some of these statutes put the burden on the owner of a restrictive non-possessory interest to establish that it is still "of substantial benefit" before it can be enforced.[100] For example, in addition to the durational limitations and recording requirements described above, Massachusetts law provides that use restrictions will not be enforced "unless it is determined that the restriction is at the time of the proceeding of actual and substantial benefit to a person claiming rights of enforcement."[101] Even where restrictions continue to be of substantial benefit, remedies for violation are limited to damages in those cases in which changed circumstances have "reduce[d] materially the need for the restriction or the likelihood of the restriction accomplishing its original purposes or render it obsolete or inequitable to enforce except by award of money damages."[102]

What would it mean to borrow the changed circumstances concept and apply it to copyright? The most straightforward way to incorporate this idea would be for judges applying the case-by-case analysis of the fair use doctrine to include in that inquiry a consideration of the age and continued importance of the copyright at issue. Several scholars have suggested this approach, tying it persuasively to fair use's statutory factors.[103] Here we see that the approach has a

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97. *See generally* SIMES & SMITH, THE LAW OF FUTURE INTERESTS § 1992; *cf.* Korngold, *supra* note 43, at 572.

98. SIMES & SMITH, *supra* note 97, at § 1993.

99. *See generally* Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1414 (2013) (observing that "[m]odern lawmakers have come to doubt the wisdom of" setting a very high and inflexible bar for terminating obsolete servitudes).

100. Other statutes refuse to enforce restrictions that have become "nominal." For example, a Michigan statute provides that "[w]hen any conditions annexed to a grant or conveyance of lands are merely nominal and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto." MICH. COMP. LAWS. ANN. § 554.46.

101. 184 MASS. GEN. LAWS ANN. 30. *See also* 184 MASS. GEN. LAWS ANN. 26 (applying section thirty and related provisions to "[a]ll restrictions on the use of land or construction thereon which run with the land subject thereto and are imposed by covenant, agreement, or otherwise," with some exceptions).

102. 184 MASS. GEN. LAWS. ANN. 30; *see also* N.Y. REAL PROP. ACTS. LAW § 1951 (McKinney 2005).

103. *E.g.*, Hughes, *supra* note 8 at 775; Liu, *supra* note 8, at 410; *see also* Note, *supra* note 8, at 1196. More recently, Jennifer Urban has argued that the fair use should be applied

property law pedigree as well. More dramatic versions of this approach could also borrow from the tangible property tradition. The Massachusetts law just cited basically imposes a harm requirement before enforcing private land use restrictions. Inspired by this tangible property example, copyright law could be reformed to adopt a similar harm requirement — perhaps one that would operate only against non-author copyright owners.[104]

VI. CONCLUSION: DISCIPLINING THE DEAD HAND OF COPYRIGHT

The preceding Part demonstrates a range of techniques that courts and legislatures have deployed to limit the problems caused by long-lasting remote control property rights. These techniques include invalidation of some purportedly perpetual or long-lasting interests (the Rule Against Perpetuities), mandatory term limits imposed on restrictive servitudes and future interests that are not subject to the Rule, periodic recording requirements, and ex post invalidation of obsolete restrictions.

Ironically, tangible property rights that are often characterized as infinite thus offer lessons for cabining copyrights that are supposed to be for limited times but in practice impose constraints that can last forever. Copyright's constraints burden not only potential users of copyrighted works, but even the very authors whose intellectual legacies those works (and copyright law) ought to secure.[105] Authors are often as helpless as everyone else to lift restrictions imposed by copyrights that the authors long ago assigned away. Nonetheless, proposals for addressing these problems are met with objections often framed in terms of property rights, with some vocal copyright owners insisting that their property should not be uniquely burdened with durational limits, recording obligations, or doctrines that consider the possibility that their rights have outlived their usefulness. But looking carefully at the law of tangible property reveals that such burdens would be far from unique, especially when we examine the law's treatment of "remote control" property rights that are most analogous to copyrights.

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to permit digitization of orphan works. *See* Urban, *supra* note 5; see also H.R. Rep. No. 94-1476, at 136 (1976) (quoted in Urban at 1392); S. Rep. No. 94-473, at 64 (1975) (explaining that if a work "is 'out of print' and unavailable for purchase through normal channels, the user may have more justification for reproducing it than in the ordinary case").

104. On the possibility of reforming copyright to prioritize the interests of authors over non-author copyright owners, see generally Molly S. Van Houweling, *Authors v. Owners*, 54 HOUS. L. REV. (forthcoming 2016).

105. Their legacies are endangered because most books quickly go out of print — at least until long after their authors have died (and copyright finally expires). *See generally* Paul J. Heald, *How Copyright Keeps Books Disappeared*, 12 J. EMPIRICAL L. STUDIES 829 (2014).

When put in the context of this property jurisprudence, proposals to shorten — or at least stop extending — copyright's duration, to condition long duration on periodic recording, or to use flexible ex post doctrines like fair use to effectively shorten copyrights that are doing more harm than good are not revolutionary or confiscatory.[106] They are modest nods to a long property tradition of looking ambivalently on remote control property — recognizing its potential to serve goals associated with long-term investment in valuable resources, but guarding against its potential to unjustifiably constrain resource use long after those goals are accomplished or obsolete.

106. For examples of these proposals, see the sources cited in notes 3–4, *supra*.