

The Durationator® Copyright Experiment

Dr. Elizabeth Townsend Gard

Tulane University Law School

Abstract

Copyright is a balance between copyright holders and the public, where copyright holders are given a limited monopoly but at its completion, the public is free to use the works as it wishes. But when does a work transition from protected by copyright to its new life in the public domain? That depends on the particular law of the country in which one wants to use the work. This becomes fairly overwhelming in a digital age. For the last five years, we have been creating the Durationator, a software tool that allows users around the world to input specific information about a particular cultural work and obtain legal information regarding the copyright status of the work--for the U.S., for specific regions, for the whole world. As more and more old works are saved, preserved and made available in a digital context, the need for such a tool becomes more urgent. Our project has researched and is in the process of coding the copyright law (in terms of duration) for every country in the world, including dependencies.

Author

Elizabeth Townsend Gard is an associate professor of law at Tulane University Law School, co-director and co-founder of Tulane's Center for Intellectual Property Law & Culture, and director and co-inventor of the Durationator(r) Copyright Experiment, a software program that determines the worldwide copyright status of every kind of cultural work. Since 2004, she has been a non-resident fellow at the Stanford Law School Center for Internet and Society. She, along with her husband, have begun the Copyright Research Lab and Help Center, which will offer low-cost self-help solutions to copyright questions

1. Introduction

One of the greatest challenges facing preservation and access research and development is copyright law: when are works in the public domain, when do library exceptions or fair use apply, when does state law apply (sound recordings, for example), how are foreign works to be treated, and which works can one post on the Internet without facing liability. These are just a few of the questions plaguing librarians, artists, scholars, teachers, corporations, the content industry, digitizers, students, hobbyists – everyone in a digital age.

The Durationator® Copyright Experiment tackles the question of when, how, and in what circumstances people (librarians, scholars, filmmakers, teachers, hobbyists, digitizers) can use cultural

works.¹ We see the need for access to accurate, accessible, quick, and low/no cost solutions as key to work in the arts and humanities, to preserving the culture, and to bringing the old into the Internet Age, e.g. digitization. In the last five years, at Tulane Law School, we have devised procedures for determining the copyright status of a work worldwide. We have researched and coded the copyright laws of every country in the world. To date, only copyright experts in the field have seen the work. Starting in the Summer 2012, we began branching out to individuals and our strategic research partners to understand how our raw research can be applied within specific settings—libraries, individual scholars, artists and filmmakers, publishers, digitizers, lawyers, and the corporate content industry.

The research for the project has been our main focus, and has been arduous, both in depth and scope. Many unexpected significant research questions had to be answered and that research then often had to be replicated in 200+ countries in the world. The research is never-ending but we find that we have developed a system to tackle these hard questions from which others shy away. Our project does not directly digitize works, nor does it create a database of public domain images. Rather, the Durationator® Copyright Experiment provides legal information for specific queries from users, who bring information about a particular work to the software tool.

The project began as a quest to understand U.S. law for domestic and foreign works, but it quickly broadened to include current law for every country, including dependencies in the world. Copyright may be territorial, according to the law, but the reality of our world is that we are all engaged in a global world. In the end, we hope our tool could be used in any instance to determine the copyright status of a cultural work, whether for a local or global use.

2. Copyright and Code

In January 2012, Justice Breyer, in his dissent of *Golan v. Holder* referenced my research and work with the Durationator® Copyright Experiment at Tulane University Law School. In explaining why copyright restoration of foreign works that had fallen into the U.S. was problematic, Breyer wrote, "...the statute's technical requirements make it very difficult to establish whether a work has had its copyright restored by the statute. 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, 216–220 (2011) (describing difficulties encountered in compiling the information necessary to create an online tool to determine whether the statute applies in any given case)."² Personally, being cited by the U.S. Supreme Court is an important moment in one's career as a legal scholar. For me, it was particularly sweet, because our hard work here at Tulane University had been recognized in the most significant forum in law—the Durationator® Copyright Experiment had arrived.

I have been researching questions of copyright within a practical, real world scenario for seven years.³ I have come to believe that only code can make law accessible, and therefore, allow the average

¹ Tulane Law Students made a [two-minute video about](#) our project available at our website www.durationator.com.

² *Golan v. Holder*, 132 S.Ct. 873 (2012).

³ Published papers include Elizabeth Townsend Gard, "A Tale of Two Ginsburgs: Eldred v. Ashcroft and *Golan v. Holder* (DePaul L.R. forthcoming), Elizabeth Townsend Gard and Erin Anapol, *Federalizing Pre-1972 Sound Recordings: Two Proposals*, co-authored with Erin Anapol (Tulane J. of Technology and IP, forthcoming), Elizabeth Townsend Gard, *In the Trenches with Section 104A: An Evaluation of the Parties' Arguments in Golan v. Holder as It Heads to the U.S. Supreme Court*, Vanderbilt Law Review (invited, [64 VAND. L. REV. EN BANC 199 \(2011\)](#)), Elizabeth Townsend Gard, "The Making of the Durationator®: An Unexpected Journey into Entrepreneurship," book chapter in *ENTREPRENEURSHIP AND INNOVATION IN EVOLVING ECONOMIES*:

user—everyone—to understand the choices we make when we post a family photograph on Facebook, choose to include a map in our scholarly publication, or decide which music to include in a documentary film. Our experiment at Tulane University attempts to use code to make available highly technical and difficult copyright law.

Can code make law accessible? In the 21st century, many laws have become so complex, particularly in an Internet age of multiple jurisdictions, that few average people can understand our laws. Lawyers themselves have trouble sorting through which laws apply, and if you have questions regarding copyright and posting works on the Internet, one could conceivably need to consult 220 different laws, for example, just to assure a work is in the public domain. Humans cannot perform this task. Code must come to our aid.

The Durationator® Copyright Experiment began as a research problem to a simple question: **can one determine the copyright status of a cultural work in the context of posting the work on the Internet?** Since no “Internet” copyright law exists, this meant to determine whether a work—a poem, novel, film, photograph, computer software—was either protected by copyright or free for all to use in the public domain—one must determine country-by-country the copyright status of that particular work. While the Berne Convention works to harmonize copyright laws, in fact, many differences appear, and some countries, including Russia, the U.K. and especially the U.S. are particularly complicated. After years of research and coding, we now know the copyright status of any specific work in each individual country of the world.⁴

3. Significance

3.1. The Durationator® For All Users of Culture

We believe that users of all kinds will benefit from legal information delivered in a form that is accurate, accessible, immediate, and at low/no cost. In short, the software was designed for my graduate self—an American worried about which British works I could use from a Canadian archive. It turned out that my

THE ROLE OF LAW, Megan Carpenter, ed., 2012, to be published with Edward Elgar Publishing., Elizabeth Townsend Gard, and Copyright Class 2011, Reply Comment, Pre-1972 Sound Recordings, U.S. Copyright Office (created collaboratively with the 2011 Copyright Class), April 13, 2011, available at <http://www.copyright.gov/docs/sound/comments/reply/041311elizabeth-townsend-gard.pdf> (*cited and proposal partially adopted by Copyright Office report), Elizabeth Townsend Gard, *Copyright Law v. Trade Policy: Understanding the Golan Battle within the Tenth Circuit*, 34 COLUMBIA JOURNAL FOR LAW AND THE ARTS 2 (Winter 2011), 131-199, W. Ron Gard and Elizabeth Townsend Gard, “Marked by Modernism: Reconfiguring the ‘Traditional Contours of Copyright Law’ for the Twenty-First Century” *Modernism and Copyright*, edited by Paul Saint-Amour, *Oxford University Press*, 155-172 (invited piece and published), W. Ron Gard and Elizabeth Townsend Gard, *The Present (User-Generated Crisis) is the Past (1909 Copyright Act): An Essay Theorizing the “Traditional Contours of Copyright” Language*, 28 CARDOZO ARTS AND ENTERTAINMENT LAW JOURNAL 455, (455-499) (2011), Elizabeth Townsend Gard, *Introduction to Shirley Millard’s I Saw Them Die* (1936, reprinted Quid Pro Books, 2011) (invited; introduction to public domain work in the U.S.), and Elizabeth Townsend Gard, *Unpublished Work and the Public Domain: The Opening of a New Frontier*, 54 J. COPYRIGHT SOCIETY OF THE U.S.A. (Winter 2007).

⁴ We also know the copyright status of any work within historical time for about ten jurisdictions. That is, if you were living in 1799 in the U.S., would that particular painting, for example, have been under copyright? In 1840? 1910? We found the historical paths, as we call it, as important as current law, and have spent a good deal of time with Russia, Germany, Israel, Japan, China, France, the United Kingdom, the Berne Convention itself, and are working on other countries. This requires an understanding of case law, statutes, amendments, historical works, and custom.

worries were the worries of the world—from the Google Book Project and HathiTrust, both engaged in lawsuits over copyright infringement to the independent author writing a book on perfume history to the Disney studio engaged in negotiations over the rights of *Bambi*.⁵

We have worked with a number of different individuals and groups over the years – and we have found that whether it is Electronic Frontier Foundation, a movie studio, University of Michigan, an independent scholar, a book publisher, or a graduate student, the Amistad Research Collection – the same questions arise. All of these groups want to know the legal status of the work—what they can and can't do with a particular work. Their expertise in copyright may vary. But their needs and questions are consistent. To that end, we have developed a couple of strategies. First, the Durationator® itself will eventually be available to the public, with a no/low-cost version available. In the meantime, we are developing a business model that combines DIY Copyright Coaching (legal information) with one-on-one legal advice with an attorney. Finally, we will provide Durationator® Reports, Auditing Services, and Consulting as full-service legal advice as well. The research will continue to be done at Tulane Law School. The spinout services and products will be housed at Limited Times, L.L.C.

3.2 The Durationator in Libraries and Digitization Projects

3.2.1 Libraries

We believe the Durationator® Copyright Experiment will provide a valuable solution to daily copyright problems in the library by helping to determine if a particular item can be added to a digital archive, used by a researcher with or without restrictions, or transmitted electronically to remote users. In the age of electronic communication, users are requesting to have materials available electronically at an ever-increasing rate. Most librarians however, are reluctant to reproduce material that could still be under copyright protection. The Durationator® Copyright Experiment will provide librarians with a simple method for determining the copyright status of the research materials their users need most and make digitizing unique or historic collections far simpler.

Additionally, a strange disconnect occurs. Libraries digitize and post works, and look to the copyright questions for their own liability issues. We have seen broad categories being applied, a generalization. But for the user coming to that work—to include in a book, a movie, on a website—we must actually *know* the copyright status. We are not, as users, protected by the library's assertion “no known copyright restrictions.” The Durationator can bridge the gap. It can take the information provided by the library and provide a tool for users to do a specific legal search related to that specific item. More certainty.

We also see the need for the Durationator® with archival materials, especially in their non-digitized state. Making use of valuable primary source materials in library special collections will be far simpler with the help of the Durationator®. A Durationator® search results report could be attached to the record of items in a library's special collections, allowing users to immediately know which works they could freely use in their research and which would need permission. Upon seeing the attached search results, researchers would also learn about the Durationator® and would know to use the service if they had further questions about additional materials they encounter throughout the research process.

In Interlibrary Loan, libraries could perform a Durationator® search on any item lent to another

⁵ The Authors Guild v. Google, 770 F. Supp. 2d 666. Authors Guild v. HathiTrust, Complaint SDNY. Twin Books Corp. v. Walt Disney Co., 83 F. 3d 1162.

library before shipping the item through the mail.⁶ If the work is no longer under copyright protection and is often requested, digitizing the work and sending a digital copy in the future will save time, money, and the environment by cutting down on shipping costs and eliminating the risk of damage in transit. For academic libraries, copyright issues are a major concern for administering electronic course reserves systems. With the help of the Durationator®, librarians and professors could identify which works require permission and take affirmative steps to ensure that copyright law is observed while still making the work available for students.

Finally, the Durationator® Copyright Experiment will contribute to raising awareness of copyright issues for libraries and their users and allow historians, hobbyists, educators, and researchers to feel confident that they are complying with the law in their own work. By providing access to Durationator® searches for library materials, libraries can promote the use of their collections confidently and responsibly, making valuable research materials more accessible to all.

The Durationator® Copyright Experiment has formed strategic research partnerships with Louisiana libraries to assist in testing and adapting the product to serve the many needs of the library community--through LOUIS, the Louisiana Library Network, MediaNOLA, and the Amistad Research Collection at Tulane University. In addition to the librarians with copyright expertise who are serving on the Copyright Advisory Board (Kenneth Crews and Peter Hirtle), Tulane law student and former Access Services librarian Kathryn Munson has also been recruited to the product development team as the Director of Library Research to meet the needs of this unique service group, and will serve as our Director of Library Research and Outreach.

3.2.2 Digitizing Projects

Digitization projects—in libraries, by corporations like Google, and by hobbyists—abound. Moreover, litigation regarding copyright infringement over digitization projects raises the profile of the need to determine properly the copyright status of the many millions of works being digitized.

We think the Durationator® Copyright Experiment could assist with digitization projects, both large and small scale. We also realize that just because a digitization project has determined a work is in the public domain—say, as part of the proposed Google Book settlement—does not mean that a user can depend or receive benefit from the safe harbour provisions that Google receives. This means that a user using a Google book *should run his/her own search*. If accepted, Google will not be penalized if they get the answer wrong, but users using a particular work, could be.

We also believe there are more works to be digitized beyond books. To date, the majority of the projects have focused on either books (the easiest category to determine) or pre-1923 works (again an easy category). We want to encourage the many other layers of culture that remain underutilized because of the difficulty of determining their copyright status. We've worked with Quid Pro Books to help uncover previously unknown public domain books, including the republication of Shirley Millard's *I Saw The Die*. We are also now working with University of Michigan as an independent third-party auditor of their large-scale project to determine the copyright status of thousands and thousands of books. University of Michigan's library has become one of our Strategic Research Partners in determining the copyright status of foreign works, and also serving as an outside auditing system for their work.

⁶ See the recent decision in [Cambridge University v. Becker](#) (delivered by the district court on May 11, 2012) regarding interlibrary loans at Georgia State. The 350 page opinion brings home the issue of copyright's role in libraries' daily activities.

3.3 Understanding Current Litigation and Copyright

Three major cases have involved cultural works held in libraries and their availability and access in a digital context: Google Books and the Proposed Settlement (that was rejected by Judge Chin), the Author's Guild v. HathiTrust litigation over making available "orphan works", works still under copyright but whose authors cannot be located to give permission, and Cambridge University v. Becker, regarding course materials in a digital context at Georgia State. Each of these cases has at their core what libraries can and cannot legally do with works, and this depends on copyright status of each individual work. The Durationator® Copyright Experiment has watched this litigation storm with great interest. If the Google Book settlement is approved, Google will have a safe harbour on "mistakes" they make in determining the copyright status of works (labelling works in the public domain when they are actually still under copyright). However, users of the Google books will not have the same protection, nor will Google's determination of the copyright status of the work be good for anyone but Google. The settlement does not allow users to legally depend on the analysis performed by Google. We think the Durationator® will be needed more than ever if the settlement is approved. What is clear from this litigation is that libraries, scholars, and others in the humanities are not immune from litigation, and a tool like the Durationator® is needed more than ever.

4. A Personal Context for Creating the Durationator® Copyright Experiment

My own journey with copyright began in 1987, when I first encountered what would become my dissertation subject. While taking an undergraduate course in the Culture of War, I was assigned the Great War diaries of British writer, Vera Brittain (1893-1970). The next week, another student presented Brittain's memoir on the same time period, and I remember the stark differences in interpreting the same events, with the student actually accusing me of getting the events all wrong. I was encouraged by the professor (later my dissertation chair) to write a seminar paper on the two works, my undergraduate honours thesis on Brittain's larger transformation, my master's thesis on Brittain's interwar years, and my dissertation as a comparative generational biography, with Brittain as the focus but in comparison to other men and women writers of her generation.

The broadening of my dissertation from merely a study in Brittain was due to copyright questions arising from the Brittain papers, and whether Brittain's literary executor (also writing a biography at the time) would give permission to publish. Diversifying solved the problem, and also proved a more interesting project. But I found myself exposed to the uncertainty of copyright and how it affected my daily work. Could I use a 1917 unpublished letter?⁷ How was this different than quoting from the published version?⁸ Who did I need to ask permission from to use a particular photograph, clearly not taken by the Brittain family, and did one always have to ask permission or could I actually rely on fair use? What did it mean when a work went into the public domain, and how would one determine if that

⁷ The unpublished portions of the letter are in the public domain in the U.S. However, the published portions of the same letter are under copyright through December 31, 2047. 17 U.S.C. 303(a). At the time I was working on the project, however, the entire letter was under copyright in the U.S.

⁸ It turned out that the published memoir was in the public domain in the U.S. while I was a graduate student, but was "restored" by a complicated part of the copyright law in 1996. *Golan v. Holder*, the recent U.S. Supreme court case addressed this issue. I have spent a good deal of my career focused on "restored" foreign works, both within my research and the implementation of the statute in the Durationator®.

had occurred? I loved all of the materials I was encountering, but I felt unsure about what works I would actually be able to use in a publication, and what restrictions I might face from a literary executor.

At the Centenary conference for Vera Brittain, where I presented my work on gender and generational theory, I began hearing more and more stories from Brittain scholars of the difficulty of getting permission to publish from the current literary executor, who was writing his own biography of Brittain. The warnings would have scared any young graduate student. I also started to hear stories from other scholars in history that had abandoned projects for fear of getting entangled in uncertain legal status of works, and having nowhere to turn. Then, only in my early-twenties, I turned to my father, who, like all of the men in my family, was a lawyer. He took me to a law library in Los Angeles, which opened a whole new world, changing my path forever. For it was here I found and began to research the legal doctrine of fair use, copyright term, and other elements that have now come to dominate my life.

Upon completing my doctorate in May 1998, I enrolled in law school the following fall.⁹ I wanted to find answers to the questions that haunted not only my work but also others' I had encountered during my graduate work. It was also at this time, in the mid-1990s, that faculty began asking themselves what could they post and include on this new idea of a "web page" for courses, and like the materials of scholarship itself, no one seemed to have reliable legal answers on which to depend. I set out to understand copyright within an academic setting, and forge my own path as an advocate for scholars and teachers.

After completing my law degrees at University of Arizona, I was offered a Leverhulme Fellowship at the London School of Economics, to pursue research on copyright issues affecting academia, and to teach copyright (UK and International). There, I began to realize that the issues I had seen in my doctoral work had a distinctly important international component, and was broader than merely my own struggles as an academic writing 20th century biographies. The whole world seemed to have the same questions: when could they legally use a particular work? By 2005, the world, once analogue, had become digital, and copyright law, which was structured on a 19th concept of territory, now had to adapt those concepts to an instantaneously global world. My small questions of which works could she use in her dissertation now had global dimensions.

The postdoc led to a Visiting Assistant Professor position at Seattle University in 2006, and a tenure-track position at Tulane University Law School in the Fall 2007. It was in the Summer 2007 that the Durationator® Copyright Experiment was born. Two events occurred. A rising 2L law student with computer coding experience came to work for me, and an unsolicited email arrived asking if it was legal to use a Vera Brittain poem from 1918 as lyrics to a new musical composition—that is, was that poem in the public domain? As part of my research and job talk that year, I had been working on a piece on copyright and the public domain, and in particular the status of unpublished works. I knew the answer would be complicated. I didn't realize how complicated. After a number of months of research, I had the answer. I also realized that the system in place made it nearly impossible for anyone—trained in law or otherwise—to actually determine the copyright status of works. The idea of a software tool had been born. I always knew that I, along with my spouse (also a J.D./Ph.D.), had wanted to start a clinic or outreach program to assist scholars, students and teachers. Now, I wanted to make the copyright status of every work ever created—anywhere in the world—available.

⁹ I actually hid this information from my doctoral chair until I completed my first year. It was the biggest secret I ever kept. He had been so supportive since my late teens and my first discovery of Brittain. I didn't want to disappoint him in my divergent path, but I also felt compelled to know the answers in my quest.

Every work has a particular term of protection, and then after that term expires, all can use the work without permission. The work is in the public domain. The legal question I sought to answer: when did that occur—in the U.S., in the U.K., by posting it on the Internet, by disseminating it in Spanish-speaking countries, by making it available to the world? I knew it would not be an easy question—my brush with comparative copyright in the UK had taught me quickly how complicated international copyright issues could get. But with my 2L research assistant, we set out to research and code the world’s copyright laws, and to answer the question: when does any particular work come into the public domain? We naively thought it would take a summer. After five years, we have finished Phase One of the project, and we are now on to Phase Two, making the information and access to help available to the public.

Along the way, one more important element occurred...I found an intellectual community that supported and cared about the work that I was doing. It has been a whirlwind of exciting activities over the last five years—far more than I ever dreamed in my pre-tenure life. I’ve met, shown my work, shared meals, and been encouraged to continue the Durationator® Copyright Experiment by individuals I never dreamed I would even meet—David Nimmer (Nimmer on Copyright), Bill Patry (Patry on Copyright, Google Senior Copyright Counsel), Paul Goldstein (Stanford), Jule Sigall (Microsoft Senior Copyright Counsel), Peter Jaszi (American University), Pam Samuelson (U.C. Berkeley), David Carson (U.S. Copyright Office), Diane Zimmerman (NYU), Graeme Dinwoodie (Oxford), Daniel Gervais (Vanderbilt), Tony Reese (Irvine), Kenneth Crews (Columbia), to name just a few. Together, this group comprises some of the smartest folks on copyright in the U.S., and in particular duration, the public domain, and international issues. Each of them have sat with me, talked with me, and even reviewed what we are doing on the project. They all have not only been encouraging, but they most have agreed to act as our Copyright Advisory Board, which includes being part of our alpha prototype testers. This is what makes our project so unique. It is an academic working to find answers for other academics and productive users of cultural works researched by a law professor in a culture where other law professors intellectually support the work at hand. It has been the most amazing experience.

For all of this, I have stayed true to the project, and thanks to Tulane University’s support, have been free to develop the mission and goals free from outside restraint or pressure. I want the software to help my old self—the graduate student wanting to know which works I had to ask permission from the literary executor, which works might qualify for fair use, and which were in the public domain. I don’t want others to have to go to law school, spend five years and thousands of student research hours, and over \$100,000 in university funding to find the answer. I want DIY services that will help train those interested in self-help, while at the same time also providing them resources to legal advice. I want, in the end, to help the world determine the legal status of our cultural treasures.

The project has benefited greatly by the dedication and devotion of so many law students over the years. They have been amazing, individually and as a group. The work, ideas, and intellectual decisions they have all made make the software that much better. They have been my colleagues, and I have watched each of them grow in tremendous ways. It has been one of the great joys of the project—to see their leadership and research skills grow, and then to see them transition into their own careers and interests. We have had over three dozen students work on the project—and I’ve seen them grow and develop as well. It has been one of the great blessings of the project.

One more component significantly added to the support and success of the project: my spouse, W.R. Gard. First, he was willing to move many times, even when it was not in his best interest and his career—a trailing spouse is never easy. For that I am insanely grateful. The opportunity to work in a

comparative and internationally focused law school at Tulane Law School presented itself to me, and he was willing to take a lesser position at a neighbouring school, instead of going on the market himself. But many spouses sacrifice. It was during dinner conversations that the essence of the project developed, and our method for figuring out how to move through the system took shape—for it was his theoretical work that changed the way we move through the U.S. law. We have co-authored a number of papers on this topic, but essentially, it was only in applying a Marxist reading comparing the turn into the twentieth century with the turn into the twenty-first century in both the culture and the law protecting culture that we came to realize key elements of the system. His theoretical work, his own development of a theory of reading, has deeply influenced the shape and success of our project. Finally, he has been willing to take on significant responsibilities, including becoming the sole managing-member of our Tulane spin-out company, Limited Times, LLC.

Part of Ron's work focuses on the development of the corporation, and how this influences who we are as people—how the 19th century corporate form, the 20th century corporate form, and the 21st century corporate form deeply affects how we live, love, and physically live in the world. His doctoral and post-doctoral work focuses on developing a theory of reading the corporation through literature and film, using human geography, Marxism, and literary theory. Part of my own struggle with the idea of a spinout company was where we fit within the larger world, and how we stay true to our project. Ron has taken on that struggle, both in form and substance. The LLC, as we envision it now, will remain a closely held corporation, so that we can control its meaning and message. We will offer what we yearned for ourselves so long ago as graduate students—a place where we could learn how to understand the laws ourselves, and empower us to make thoughtful choices. This is what Limited Times LLC will do, and again, thanks to Ron, we will be able to see our vision come true. We want a project that can sustain itself financially, making sure that it can continue to update the technology and the law of every country in the world.

5. Major Research Questions Underlying the Durationator® Copyright Experiment

In developing the software, we have had many, many research hurdles that often have turned out to be very, very, very difficult and time-intensive queries—whole projects onto themselves. Many of these have become paper(s) in their own right, and we will continue to expand the research necessary to understand the state of duration and access in copyright law worldwide. In short, copyright duration is complicated on many levels.

First, within the U.S. context, the records needed to determine the copyright status of works published before 1978, until recently had not been digitized, and therefore were inaccessible to most. Even if one could get their hands on a copy of the Copyright of Catalogue Entries in one of the regional depositories, the extensive records are not intuitive, and their organization changes over the years. We worked a great deal with the original records to try to understand how to determine the copyright status of works, and where the average user would have trouble figuring this out. Now that they are digitized, one has access, but because all but the book records remain in scanned form only and not in a searchable database, their level of inaccessibility remains. I was told by someone at Google that they were working on the problem, but with no known date of releasing the records in database (XML) form, as they did with the book records. This is a very serious problem—as these records tell you whether a work was registered or renewed, was published or unpublished, foreign or domestic, and under what category they were registered—all valuable information needed to determine the copyright status of pre-1978 works in the 21st century.

We also encountered problems with legal questions regarding publication, government employment records, sound recordings, the status of state government works, and foreign laws necessary for determining the copyright status within the U.S. Each topic has turned into a major research project (involving many students) and eventually into research paper(s) the results of which are coded and incorporated into the Durationator® Copyright Experiment.

Our greatest hurdle was Section 104A, and it is this work that Justice Breyer referred to in his dissent in *Golan*. Section 104A restored copyright to foreign works that had fallen into the public domain before their copyright had expired in their home country. How the amendment went about doing this was problematic on many levels, and to that end, I've been writing in one way or another on this topic for the last three years.¹⁰ Moreover, we had to research each country of the world to determine the copyright status of their laws at the time of restoration (which varies depending on the country), which itself proved very problematic, as most countries have altered their laws in the last ten years, and moreover, the old laws are not very accessible as they are generally from a pre-Internet era. I have had three students over three summers devoted to this project, and we believe, that by January 2013, we will have finally the data to complete our Section 104A path.

But Section 104A will surely be matched by our newest project—the rule of the shorter term. This is a complicated part of the Berne Convention that states that a term of copyright can be shorter if the country of origin's term is shorter than the country's term where protection is being sought. The problems are many. First, a country must elect not to adopt Rule of the Shorter (RST) term. Second, Berne may or may not be self-executing, and therefore, some countries may explicitly not adopt RST, but it would only apply if Berne were self-executing. Third, Berne has a component that exempts RST if there is a bilateral or other treaty in place that speaks to the issue. And so, as we have done before, we must now determine all of these elements for each country in the world. I began to see the problem when I was training a law student new to the project. We were doing research on Zimbabwe, and we got to the question regarding Rule of the Shorter term. No mention was made in Zimbabwe's copyright law. The next question we faced was whether Berne was self-executing or required implementing legislation. We soon realized that whether Article 7 of the Berne Convention applied in any particular situation was very complicated and required extensive research. We think this will be our larger Summer 2013 project.

Foreign laws are not the only challenges we faced. Pre-1972 sound recordings are covered by states rather than federal law. We have worked extensively on mapping each state's laws, and also contributing our comments and suggestions to the U.S. Copyright Office's call for comments and replies in the proposition of federalizing pre-1972 sound recordings. State government works are also complicated, and we are beginning to research how to determine when a state or local government is asserting copyright. Finally, federal government works are no picnic either, requiring a great deal of research. While federal government works are in the public domain, determining what counts as a federal government work involves questions of whether a work falls under the scope of a government employee's employment, among other issues. It's complicated.

¹⁰ The majority of Dr. Townsend Gard's research work has focused on Section 104A, the restoration of foreign works. The first piece looked at the mechanics of the amendment; the second piece (invited by Vanderbilt) looked at the briefs leading up to the oral arguments for *Golan v. Holder*; the third piece analyzed the lack of First Amendment analysis in what was billed as First Amendment cases (*Golan v. Holder*, and also a patent case); the fourth piece compares Ginsburg's outcome in *Eldred* with her writing in *Golan* and asks where do we go from here; and the final (hopefully) piece is an invited piece from Franklin Pierce on the relationship of the treaty clause and the IP clause after *Golan v. Holder*.

The project has also worked on unpublished works—the research in fact is where the project began, and we have now begun working on implementing our research in a practical setting, using the MediaNOLA and courses at Tulane University implementing archival materials as our laboratory. What information does someone using archival materials have at hand, and how can we determine the copyright status using those resources? We are trying to make our research as accessible and error-proof as possible.

We have many other projects—one on social media and copyright, another on the U.S. Holocaust museum and its agreements with museums around the world, historical case studies of copyright in Germany, Israel, China, United Kingdom, Australia, and Japan, and a number of studies focusing on the 1909 Copyright Act. All of these projects, and future projects, hope to add to the knowledge base contained within the Durationator® Copyright Experiment.

6. Our Partners and Advisory Board

6.1 Copyright Advisory Board

The board functions to assist in advice with complex research questions (i.e. Rule of the Shorter term interpretation), testing of the alpha prototype, and in particular, reviewing our plans for future research projects. They will also assist in helping us strategize on the final plan for dissemination and sustainability. All of the following IP scholars and practitioners are familiar with our work, and in particular, the Durationator® Copyright Experiment. Some have been involved more than others. Each have seen the Durationator® demonstrated.

- Pamela Samuelson, Professor of Information; Faculty Director, Berkeley Center for Law & Technology; Richard M. Sherman Distinguished Professor of Law
- Peter Jaszi, Professor of Law, Faculty Director of the Glushko-Samuelson Intellectual Property Clinic
- David Nimmer (Nimmer on Copyright)
- Graeme Dinwoodie, Professor of Intellectual Property and Information Technology Law
- Daniel Gervais, FedEx Research Professor of Law
- Peter Hirtle, Senior Policy Advisor, Cornell University Library
- Kenneth Crews, Director, Columbia Copyright Advisory Office
- Tony Falzone, formerly Stanford University Fair Use Project, now counsel for Pinterest
- Julie Samuels, Electronic Frontier Foundation
- Glynn Lunney, Tulane University
- Alan Childress, Quid Pro Books
- Jule Sigall, Microsoft
- Deborah Gerhardt, University of North Carolina School of Law

6.2 Strategic Advising Partners

Over the years, we have worked directly (EFF, Stanford Fair Use) or had discussions about the Durationator® with the following institutions, and we would include them in our discussions on how to make the software accessible and useable to the general public.

- University of Michigan, Copyright Review Management System – World Project
- Stanford Law School Fair Use Project
- LOUIS: Louisiana Library Network
- Amistad Research Center, Tulane University
- Jazz Archive, Tulane University
- Newcomb Special Collections, Tulane University
- Louisiana Special Collections, Tulane University
- Konomark and Dr. Eric Johnson, University of North Dakota
- MediaNOLA and Dr. Vicki Mayer
- Quid Pro books and Dr. Alan Childress

Our work at Tulane and Media NOLA focuses on how to communicate what information is necessary to users to determine the copyright status of works—how does one quickly educate a class in architecture on how to use and determine the copyright status of works in a particular architecture archive? Our work with Quid Pro Books assists Dr. Childress in providing legal information on specific works he is interested in republishing. We are testing out our auditing services with the University of Michigan, and testing our software with LOUIS. In the next year, we are actively looking for additional strategic research partners as we transform our experiment into usable tools and forms. **In particular, we would like to find partners outside of the United States to begin understanding the needs outside of the U.S. We have learned so much from questions from individuals and institutions, and we look forward to expanding our scope and learning a great deal more.**

6.3 Testing the Delivery of Information

We are now entering into a new phase—how are we going to deliver the information provided by the research and code we have created? To this end, we are working on a number of alternatives, the successful ones that will be available at Limited Times in the near future. We have come to see our role as providing legal information and support to individuals and institutions struggling with copyright questions, and when necessary providing resources for legal advice. Even this required a great deal of legal research – to understand the line between legal information and legal advice (creating an attorney-client relationship), particularly after Legal Zoom and the new development of cloud lawyering sites. We are working on a model that meets the requirements of laws currently, and takes advantage of the new ideas about delivering legal information and legal advice in the digital era.

7. What We Have Learned – Our Journey Ahead

The journey so far has been exhilarating. I never imagined my copyright problems as a graduate student were also the problems of so many around the world. I also never imagined that I would lead a team of three dozen students into complex research and build a practical tool. I never imagined that I would be involved with so many people doing so many interesting projects. I never thought I would be starting a company with my spouse, focused on our passion of making cultural works more accessible. I certainly never even dreamed I would be cited in a Supreme Court opinion (even if it was the dissent). I love the research and work in all its complexities. And now that we are connecting to others and trying to figure out how to help them with their version of the same problem, it has become all that more interesting.

