

The Myth of the 1976 Copyright “Chaos” Theory

By [Jason Schultz](#)

In *Eldred v. Ashcroft*, a number of us joined Larry Lessig in challenging the 1998 Sonny Bono Copyright Term Extension Act. During oral argument, the Court asked whether our rule would affect the 1976 Copyright Act's retroactive term extension. Although this issue had not been briefed, Lessig indicated that it would, but that the Court's own caselaw gave it a way to strike the 1998 Act without striking the 1976 Act.

In particular, Justice Breyer was concerned about the effect on contracts entered into in reliance on the 1976 Act. His view seemed to be that there would be "chaos" if those contracts were invalidated. The Chaos Theory draws support from AOL-TimeWarner's amicus brief, which claimed that "a host of mergers and acquisitions have occurred, and innumerable licenses and contracts have been executed, that depend on valuations of copyrighted works made in line with prior [retroactive extensions.]"

To test this theory, Deirdre Mulligan (of Boalt Hall's Samuelson Clinic) and I took another look at some book numbers we had generated for our amicus brief and some newly available film numbers from the Internet Movie Database.

As of 2002, the works that would be affected if the 1976 retroactive extension were struck down would be generally those from 1927-1946. This calculation is based on the assumption that striking down the CTEA would release works up to 1927 (2002 – 75 year term = 1927) and that without the 1976 retroactive extension, works up to 1946 would be released (2002 – 56 year term = 1946).¹

Book Availability

First, we looked at book availability by number of titles. We compared the total number of titles *originally* published during 1927 to 1946 with the number of those titles that are currently available from Books In Print (www.booksinprint.com) from those years.

What we found is that of the 187,280 books published in the U.S. from 1927-1946, only 4,267 are available in 2002 from publishers at any price. In other words, of the entire universe of books published in the United States that are potentially affected by the retroactive 1976 extension, only 2.3 percent remain commercially available, while 183,013, or roughly 97 percent of those works, remain commercially dormant and inaccessible.

Film Availability

Next, we looked at films. Again, we compared the number of titles originally released during 1927-1946 with the number you could view today in 2002 from that era.

According to Internet Movie Database (www.imdbpro.com):

- 36,386 titles were released from 1927-1946; of those:
- only 2,480 are available on VHS;
- only 871 are available on DVD;
- only 114 are available on Television/Pay-Per-View; and
- only 13 are available in theaters

¹ Without the CTEA, works would generally receive a 75 year term. Without the 1976 retroactive extension, works up to 1976 would fall under the 1909 Copyright Act. The 1909 Act gave copyrighted works an initial 28-year term with the option to renew for an addition 28 years. In 1992, Congress automatically renewed all 1909 copyright terms, guaranteeing 56 years for those works.

If we assume that the VHS numbers are the most inclusive, then only 2,480 out of 36,386 titles from 1927-1946 are commercially available, or 6.8%. 93.2% of these films are commercially dormant.

Commercialization Percentages

Next, we looked at commercialization percentages. By this we mean the percentage of commercially available books or films that come from the 1927-1946 period. Here, again, we took the number of titles from 1927-1946 and compared that to the total number commercially available from all years. Here's what we came up with:

Book Numbers:

- 2,500,707 book titles are currently available today via Books In Print;
- Of those, only 4,363² are from 1927-1946;
- Thus, books from 1927-1946 only account for 0.174% (4,363/2,500,707) of total books available today.

Film Numbers:

- 27,059 moving picture titles are currently available today on VHS format according to IMDB;
- Of those, only 2,480 are from 1927-1946;
- Thus, films from 1927-1946 only account for 9.2% (2,480/27,059) of total films available today.

Compare this to films from other decades:

Films released 1960-2002:

- 21,674 out of a total of 27,059 available on VHS.
- 80.1% of available VHS Titles
- Compared to 9.2% from 1927-1946.

Films released 1970-2002:

- 19,682 out of a total of 27,059.
- 72.7% of available VHS titles
- Compared to 9.2% from 1927-1946.

Films released 1980-2002:

- 16,843 out of a total of 27,059.
- 62.2% of available VHS titles
- Compared to 9.2% from 1927-1946.

Films released 1990-2002:

- 11,730 out of a total of 27,059.
- 43.3% of available VHS titles
- Compared to 9.2% from 1927-1946.

² When we ran these numbers there was some slight disparity in the results. That is why X=4363 instead of 4,267 as it did before. This may be because BIP constantly tweaks its database and search functions and because the searches are done on different days. We've decided to give the publishing industry the benefit of the doubt and use the 4,363 number since it's higher. Given the results, we think our point is proven regardless of the number you use.

Thus, films from the last 40 years account for over 80% of the commercial film market, while films potentially affected by striking down the retroactive extension in the 1976 Act account for less than 10%.

General Conclusions

So, what can we conclude from this?

1) Striking down the retroactive extension of the 1976 Copyright Act would only affect works from 1927-1946. Of these works, very few remain commercially available, e.g. 2.3% (books) and 6.8% (films). These works also represent a relatively small percentage of the current commercial market, e.g. 0.174% (books) and 9.2% (films). Conversely, the costs to the public domain are quite large, e.g. 97% (books) and 92.3% (films) of those created.

2) Even if the few 1927-1946 titles still available retain significant commercial value, Congress could have granted these specific works more narrow protection, perhaps even on a work-by-work basis as it has done with various Drug Patent Extension Acts, e.g. Claritin. By granting a blanket extension, 97% of the book titles and 93% of the film titles are held hostage at the bequest of a rather small minority. There is no need or justification for restricting the public's right to these dormant works.

Moreover, the few thousand works still available are probably owned by a handful of companies. Thus, it is doubtful that such a relatively small number would dramatically affect mega-corporate mergers like AOL-TW or any significant number of contracts because assets of this size are fairly manageable. Heck, if the content industry expects a bunch of students, librarians, and archivists to negotiate licenses to the other 183,013 books and 33,906 films, can't the biggest corporations in the world manage the remaining 4,267 and 2,480?

3) Jack Valenti of the MPAA is fond of hypothesizing that exclusive rights are the only way to assure content gets distributed. However, here we have the results of such an experiment. For the films between 1927-1946, exclusive rights fail to make available 93.2% of the content produced; for books, 97%. Does anyone really doubt the public domain wouldn't do better?

4) No matter which way you read these numbers, the potential for "chaos" is much less than originally proposed. If the 1976 retroactive extension were struck down, the most significant impact of such a decision would not be a monumental loss of contracts or corporate mergers, but rather a dramatic increase in books available for reading and possibly the world's largest and most affordable historic film festival. Is there really any better way to promote the Progress of Science?