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## EVERY STORY HAS A BEGINNING, BUT WHAT ABOUT AN END?: DISNEY'S EXPIRING COPYRIGHTS

*Marisol Jimenez Gastelum\**

*The Walt Disney Company is one of the most powerful and influential media companies in the world that has revolutionized animated films. Steamboat Willie, the cartoon featuring the first version of Mickey Mouse, was released in 1928 and is set to enter the public domain on January 1, 2024. This iconic character has stayed out of the public domain for nearly a century because of Congress's extension of copyright duration in response to lobbying efforts by Disney and other copyright holders. Although Disney has not made another effort to lobby Congress for an extension to its copyrights, Disney's development of trademark rights over Steamboat Willie may effectively keep the earliest incarnation of Mickey Mouse out of the public domain. However, what are the implications of Mickey Mouse and other beloved characters entering the public domain? This Note argues that Disney should be able to keep copyrights—or some other type of exclusive rights—to Mickey Mouse and other beloved Disney characters because poorly made or inappropriate versions of the works will affect the public's judgments about the works' quality and meaning, and therefore their underlying value, diluting and tarnishing Disney's image. This Note proposes that Disney should lobby Congress to pass legislation that resembles Mexico's Article 173 of the Federal Copyright Law, which would provide typical real-life human, fictional, or symbolic characters copyright protection for indefinite, successive five-year periods, thus successfully keeping Mickey Mouse and other beloved Disney characters from entering the public domain.*

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## INTRODUCTION

Every story has a beginning, and this one began with a mouse. In the last century, The Walt Disney Company (“Disney” or “Company”) has become a multibillion-dollar powerhouse around the world.<sup>1</sup> Its influence is seen across a large spectrum, ranging from pop culture to policies passed by Congress.<sup>2</sup> Walter Elias Disney (known as “Walt”), the founder of Disney, reconfigured the entertainment industry by transforming animation from a novelty to “an art form that emphasized character, narrative, and emotion.”<sup>3</sup> During the twentieth century, he was one of the most significant creative forces who revolutionized animated film and made a lasting impact on American culture.<sup>4</sup> He built a synergistic empire that combined cartoons, film, television, theme parks, book publishing, merchandise, and so much more.<sup>5</sup> However, Walt was not always a prominent figure within the American animation industry.<sup>6</sup> He had very humble beginnings.<sup>7</sup>

Walt Disney was born in Chicago in 1901 and was the fourth of five children.<sup>8</sup> His father was a carpenter, the son of Irish immigrants.<sup>9</sup> Walt grew up on a farm in Marceline, Missouri, where he first received formal schooling and sold his first drawing to a neighbor.<sup>10</sup> In 1911, Walt’s family moved to Kansas City, Missouri where he attended the Kansas City Art Institute on Saturdays for drawing classes and every other day was a delivery boy for his father’s Kansas City Star delivery

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1. Scott Jeffries, *How Much Is Disney Worth?*, GOBANKINGRATES (Nov. 10, 2022), <https://www.gobankingrates.com/money/business/how-much-is-disney-worth/> [https://perma.cc/M3JQ-UTF3].

2. *Walt Disney and How He Revolutionized Entertainment and Culture*, MR. POP CULTURE, <https://mrpopculture.com/walt-disney-and-how-he-revolutionized-entertainment-and-culture/> [https://perma.cc/PL3Z-QQDS]; see also Nick H. Kamboj, *Disney’s Influence on the Enactment of the Copyright Term Extension Act (“CTEA”), as Well as the CTEA’s Retrospective and Prospective Impact* (2018) (Master’s thesis, Harvard Extension School), <https://dash.harvard.edu/bitstream/handle/1/42004051/KAMBOJ-DOCUMENT-2018.pdf?sequence=1&isAllowed=y> [https://perma.cc/NZ6Q-EMGQ].

3. NEAL GABLER, *WALT DISNEY: THE TRIUMPH OF THE AMERICAN IMAGINATION* xii (2006).

4. *Id.*

5. *Id.*

6. *Disney’s Turning Point*, WALT DISNEY, <https://waltinkc.weebly.com/turning-point.html> [https://perma.cc/4M7D-E3YB].

7. *Id.*

8. *Id.*

9. GABLER, *supra* note 3, at 4, 8.

10. WALT DISNEY, *supra* note 6.

route.<sup>11</sup> For the next six years, he woke up at 4:30 every morning to deliver newspapers until school started, then went to school, and immediately after classes ended he resumed delivering newspapers.<sup>12</sup> In 1917, his father sold the newspaper route, and the family moved around before ultimately returning to Kansas City.<sup>13</sup> Some argue that returning to Kansas City was a turning point in Walt's career, because if he had not gone bankrupt in Kansas City, he may have never moved to Hollywood where he ultimately found success.<sup>14</sup> Most importantly, however, without his time in Kansas City, Walt would not have "fed and nurtured a little mouse named Mortimer, and the world would be without one of the most beloved cartoon characters ever to be created"—our very own, Mickey Mouse.<sup>15</sup>

Walt Disney became one of the most famous American motion picture and television producers, known as a pioneer of animated cartoon films.<sup>16</sup> However, not everyone is fond of Disney.<sup>17</sup> Many critics have gone as far as to call Disney an oppressive monopoly that "threatens the viability of creative independent films, . . . limits the diversity of films available, cheapens our culture, and worsens economic and political inequality."<sup>18</sup> They believe that Mickey Mouse and other beloved Disney characters should not have their copyright protection terms extended and should instead enter the public domain.<sup>19</sup>

Scholars refer to the public domain as "just and attractive" for a democratic culture that promotes freedom of speech and the dissemination of information.<sup>20</sup> A defining characteristic of the public domain is that once creative materials enter it, individuals are free to use them without government restrictions or control on how they are used.<sup>21</sup> A common way intellectual property enters the public domain is when

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11. Ashley MacQuarrie, *Overcoming Obstacles: Hard Work and Persistence Paid Off for Walt Disney*, LEARNING LIFTOFF (Jan. 14, 2015), <https://www.learningliftoff.com/overcoming-obstacles-hard-work-and-persistence-paid-off-for-walt-disney/> [<https://perma.cc/85C8-TM6G>].

12. *Id.*

13. *Id.*

14. WALT DISNEY, *supra* note 6.

15. *Id.*

16. *See id.*

17. *See* Brett Heinz, *It's Time to Break Up Disney*, THE AM. PROSPECT (Oct. 1, 2019), <https://prospect.org/power/time-to-break-up-disney-monopoly/> [<https://perma.cc/YLC4-AF7G>].

18. *Id.*

19. *See id.*

20. Note, *Designing the Public Domain*, 122 HARV. L. REV. 1489 (2009).

21. Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 102–03 (2003).

the specified term of protection set by Congress expires.<sup>22</sup> Congress cannot remove knowledge from the public domain once it is there.<sup>23</sup> Therefore, these materials may be used freely by anyone without obtaining permission from or compensating the copyright owner or the government.<sup>24</sup>

*Steamboat Willie*, the cartoon featuring the first version of Mickey Mouse, premiered in 1928<sup>25</sup> and is set to enter the public domain on January 1, 2024.<sup>26</sup> This cartoon and the first version of an iconic character have stayed out of the public domain for nearly a century because of Congress's extensions of copyright duration in response to lobbying efforts by Disney and other copyright holders.<sup>27</sup> In 1976, Disney successfully lobbied Congress to amend the Copyright Act in order to extend Disney's protection of some of its intellectual properties.<sup>28</sup> Then, in 1998, Disney successfully lobbied Congress again, and Congress passed the Sonny Bono Copyright Term Extension Act of 1998, which became derisively known as the "Mickey Mouse Protection Act."<sup>29</sup> The legislation retroactively extended copyright protection for works created on or after January 1, 1978 to the life of the creator plus seventy years.<sup>30</sup> It also extended copyright protection for corporate works to ninety-five years after the first publication, or 120 years from creation, whichever came first.<sup>31</sup> These copyright term extensions will soon come to an end for some of Disney's most iconic cartoon characters, which begs the question: how will this story end?

Section I of this Note provides a brief background of the Copyright Act, while Section II explores Disney's influence on Congress in extending the copyright protection term. Section III establishes the following: (a) the first version of Mickey Mouse is protected by trademark law because it has acquired secondary meaning; (b) the holding

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22. *Id.* at 103.

23. *Id.*

24. *Id.* at 102.

25. *Steamboat Willie Release Info*, IMDB, <https://www.imdb.com/title/tt0019422/releaseinfo> [<https://perma.cc/4BBT-A955>].

26. Derek Chipman, *Copyright Term, Disney, and "Steamboat Willie,"* AUTHORS ALL. (May 25, 2022), <https://www.authorsalliance.org/2022/05/25/copyright-term-disney-and-steamboat-willie/> [<https://perma.cc/W4TY-83BF>].

27. *Id.*

28. *Id.*

29. *Id.*

30. 17 U.S.C. § 302.

31. *Id.*

in *Dastar v. Twentieth Century Fox Film Corp*<sup>32</sup> will not bar Mickey Mouse from benefitting from trademark law protection; and (c) Disney will lose millions if Mickey Mouse enters the public domain. Section IV discusses the ramifications of the original Winnie-the-Pooh character entering the public domain and explores the harm to children and adult consumers of having a cultural icon lose its stable and beloved meaning. Section V highlights that although Disney is not actively seeking further copyright extension, Republican members of Congress have voiced their opposition to another extension because they want to punish Disney for being a progressive powerhouse, not because they want to promote creativity and innovation in the public domain. Section VI argues that Disney should be able to keep characters like Mickey Mouse out of the public domain because inappropriate uses will tarnish their image and underlying value and dilute the quality of content that consumers receive. Additionally, Section VI explores the impact on working-class families of Disney losing copyright protection on its most iconic characters. Section VII proposes that Disney should lobby Congress to pass legislation that resembles Mexico's Article 173 of the Federal Copyright Law, which would provide typical real-life human, fictional, or symbolic characters copyright protection for indefinite successive five-year periods, thus successfully keeping Mickey Mouse and other beloved Disney characters from entering the public domain.

## I. BACKGROUND OF THE COPYRIGHT ACT

Formal copyright protections were recognized initially within England over three hundred years ago with the enactment of the Statute of Anne in 1710.<sup>33</sup> The Statute of Anne provided the ability for authors to "secure a copyright for a limited term of fourteen years" for their creative endeavors.<sup>34</sup> It was a powerful legal vehicle for the advancement of formal copyright protection, and, by the end of the eighteenth century, it had a significant impact on the United States.<sup>35</sup>

The foundation of American copyright law in the United States is Article I, Section 8 of the U.S. Constitution, which states that "[t]he

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32. 539 U.S. 23 (2003).

33. An Act for the Encouragement of Learning, 8 Ann. c. 19 (1710) (Gr. Brit.).

34. Hon. M. Margaret McKeown, *Happy Birthday Statute of Anne: The Dance Between the Courts and Congress*, 25 BERKELEY TECH. L.J. 1145, 1146 (2010).

35. Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25(3) BERKELEY TECH. L.J. 1427 (2010).

Congress shall have power . . . 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.”<sup>36</sup> Although the term “copyright” is never used, this provision of the Constitution is commonly known as the Copyright and Patent Clause.<sup>37</sup> In addition, Congress has used its power to enact copyright laws protecting the rights of individuals beginning with the Copyright Act of 1790.<sup>38</sup>

The Copyright Act of 1790 granted authors the right to print, reprint, and publish their work for a period of fourteen years which automatically expired unless the author was still alive and renewed it for an additional fourteen years.<sup>39</sup> Congress wanted to incentivize authors, artists, and scientists to create original works by providing the individual a temporary “monopoly” on his original work.<sup>40</sup> However before 1978, “85% of copyrights were not renewed and immediately went into the public domain.”<sup>41</sup>

The Copyright Act has had multiple revisions in the last two centuries, including in 1831, 1870, 1909, and 1976.<sup>42</sup> A major revision of the Copyright Act occurred in 1909 when Congress broadened the scope of categories that were protected under the act to include all works of authorship and extended the term of protection to twenty-eight years from publication with a possible renewal of an additional twenty-eight years.<sup>43</sup> Following this copyright term extension, Disney played a key role in influencing Congress to pass legislation that shaped copyright law into what we know today.

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36. U.S. CONST. art. I, § 8, cl. 8.

37. Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It with Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361 (1992).

38. *Copyright Timeline: A History of Copyright in the United States*, ASS’N OF RSCH. LIBRS., <https://www.arl.org/copyright-timeline/> [<https://perma.cc/C8NM-6NS8>].

39. *Id.*

40. *Id.*

41. *The Incredible Shrinking Public Domain*, DUKE L. CTR. FOR THE STUDY OF THE PUB. DOMAIN, <https://web.law.duke.edu/cspd/publicdomainday/2015/shrinking/> [<https://perma.cc/KS8S-TPH8>].

42. See Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124; Copyright Act of 1831, 4 Stat. 436; Copyright Act of 1870, Pub. L. No. 229-230, 16 Stat. 198; Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075; Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at scattered sections of 17 U.S.C.).

43. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075.

## II. DISNEY'S INFLUENCE ON U.S. COPYRIGHT LAW

Mickey Mouse made its debut in 1928 when Walt Disney released the cartoon *Steamboat Willie*, the first animated film to contain a fully synchronized soundtrack.<sup>44</sup> As copyright law stood at the time, this iteration of Mickey Mouse was granted fifty-six years of protection, meaning that the copyright protections should have expired in 1984, and the *Steamboat Willie* cartoon, along with the first version of Mickey Mouse, should have entered the public domain at that time.<sup>45</sup> However, with this date on the horizon, Disney began aggressive lobbying efforts for Congress to extend the copyright duration term and successfully secured the passage of the Copyright Act of 1976.<sup>46</sup>

The Copyright Act of 1976 extended the term of protection from fifty-six years to the life of the author plus fifty years, while works made for hire were granted a term of protection of seventy-five years from the date of publication.<sup>47</sup> This revision also extended federal copyright protection to unpublished works.<sup>48</sup> Without the term extension, works published between 1922 and 1941 would have lapsed into the public domain between 1978 and 1997.<sup>49</sup> Most notably, the Copyright Act of 1976 shifted the expectation that works you grew up with would enter the public domain as you were entering your middle ages, whereas now, copyright protection lasts for the life of the author and many decades beyond that as well.

In 1997, Congress introduced the Sonny Bono Copyright Term Extension Act (CTEA).<sup>50</sup> Disney and other copyright holders aggressively lobbied Congress to extend copyright duration, again, and records show that the Disney Political Action Committee (PAC) donated a total of \$149,612 in direct campaign contributions to the legislators

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44. IMDB, *supra* note 25.

45. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (providing fifty-six years of protection based on twenty-eight years of protection under the Copyright Act of 1909 plus twenty-eight years from renewal).

46. Kamboj, *supra* note 2; Winston Cho, *Disney Copyrights Targeted in Bill Proposed by Sen. Josh Hawley*, HOLLYWOOD REP. (May 10, 2022, 12:52 PM), <https://www.hollywoodreporter.com/business/business-news/disney-copyrights-targeted-in-bill-proposed-by-sen-josh-hawley-1235144054/> [<https://perma.cc/DZW5-DHY5>].

47. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at scattered sections of 17 U.S.C.).

48. *Id.*

49. *Id.*

50. See Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827.



considering the bill.<sup>51</sup> In 1998, Congress passed the CTEA.<sup>52</sup> The copyright duration term was increased yet again to seventy years after the death of the author, and for works of corporate authorship to 120 years after creation or to ninety-five years after publication, whichever term ends earliest.<sup>53</sup> The passage of the CTEA succeeded in protecting an entire generation of works for an additional twenty years.<sup>54</sup> Disney played a critical role in the passage of this legislation and greatly benefited from it as well, such that the act came to be dubbed “the Mickey Mouse Copyright Act” by some commentators.<sup>55</sup> This act retroactively extended copyright protection by twenty years, which meant that works that had already been created were awarded longer copyright terms.<sup>56</sup> Thus, Disney successfully secured copyright protection until January 1, 2024 for the first version of Mickey Mouse and the *Steamboat Willie* cartoon.<sup>57</sup>

### III. *STEAMBOAT WILLIE* ENTERING THE PUBLIC DOMAIN

Upon the expiration of *Steamboat Willie*’s copyright protection, it will enter the public domain alongside the first version of Mickey Mouse on January 1, 2024, meaning Disney will lose its ability to control who can use this original cartoon and design.<sup>58</sup> This black and white version of Mickey Mouse, which is stylistically different from the modern-day Mickey Mouse, will be free for the public to use in new artistic or commercial works and to distribute without having to pay Disney a licensing fee.<sup>59</sup> However, it is important to note that Disney will still hold the rights to the subsequent depictions of Mickey Mouse, which include the color version with the character’s famous

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51. Phyllis Schlafly, *Why Disney Has Clout with the Republican Congress*, EAGLE F. (Nov. 25, 1998), <https://eagleforum.org/column/1998/nov98/98-11-25.html> [<https://perma.cc/2D9N-59M7>].

52. Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827.

53. *Id.*

54. *Id.*

55. See Joseph Greener, *If You Give a Mouse a Trademark: Disney’s Monopoly on Trademarks in the Entertainment Industry*, 5 WAKE FOREST J. BUS. & INTELL. PROP. L. 598, 608 (2015).

56. See Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2828.

57. IMDB, *supra* note 25.

58. Chipman, *supra* note 26.

59. Kirk O’Neil, *Disney Might Lose the Rights to Two Classic Characters*, THESTREET (Jan. 9, 2022, 4:06 PM), <https://www.thestreet.com/investing/disney-faces-copyright-expirations-for-mickey-mouse-winnie-the-pooh> [<https://perma.cc/9KRU-HZ99>].

white gloves, as well as all Mickey Mouse–related trademarks.<sup>60</sup> This widely known incarnation of Mickey Mouse with white gloves was first introduced in 1929 in a short animated black-and-white film titled *The Opry House*.<sup>61</sup> Thus, the public will not be able to use this version of Mickey Mouse in its own original works until 2025.<sup>62</sup> Later incarnations, including the color version of Mickey Mouse that is most widely known, will not enter the public domain at this time.<sup>63</sup>

Some commentators have suggested that the loss of the *Steamboat Willie* copyright will not make much of a practical difference for Disney because Mickey Mouse is also protected by trademark rights.<sup>64</sup> Unlike copyright law, the Lanham Act established that trademark protection can continue indefinitely as long as the protected item, “a word, phrase, design, or combination identifies your goods or services, distinguishes them from the goods or services of others, and indicates the source of your goods or services.”<sup>65</sup> Registered trademarks may continue indefinitely, but must be renewed ten years following the marks’ registration date, and each successive ten-year period thereafter.<sup>66</sup> Corporations and individuals utilize registered trademarks so that consumers can identify their products or services, thus ensuring quality and consistency for consumers.<sup>67</sup> This association between the trademark and the corporation makes registered trademarks very valuable. Trademark law has two main purposes.<sup>68</sup> First, it provides a system that eliminates customer confusion by identifying the source of the goods or services.<sup>69</sup> Second, it gives corporations and individuals the exclusive right to the mark, which encourages others in the market to compete to have their own distinct mark.<sup>70</sup> Additionally, the registered

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60. Timothy B. Lee, *Mickey Mouse Will Be in the Public Domain Soon—Here’s What That Means*, ARS TECHNICA (Jan. 1, 2019, 9:10 AM), <https://arstechnica.com/tech-policy/2019/01/a-whole-years-worth-of-works-just-fell-into-the-public-domain/> [<https://perma.cc/8M7B-ML6C>].

61. *The Opry House*, WIKIPEDIA, [https://en.wikipedia.org/wiki/The\\_Opry\\_House](https://en.wikipedia.org/wiki/The_Opry_House) [<https://perma.cc/7833-A3EM>].

62. Lee, *supra* note 60.

63. *Id.*

64. Cory Doctorow, *We’ll Probably Never Free Mickey, but That’s Beside the Point*, ELEC. FRONTIER FOUND. (Jan. 19, 2016), <https://www.eff.org/deeplinks/2016/01/well-probably-never-free-mickey-thats-beside-point> [<https://perma.cc/5YP3-25TH>].

65. *Trademark Basics: Registration Toolkit*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/sites/default/files/documents/TM-Registration-Toolkit.pdf> [<https://perma.cc/K7D4-BV5N>].

66. *Id.*

67. 15 U.S.C. § 1127.

68. *See id.*

69. *Id.*

70. *Id.*

trademarks create a presumption of ownership and provide the registered owner the right to legal action against anyone who infringes on the mark.<sup>71</sup> Thus, trademark law offers additional protection for graphical representations of characters, like Mickey Mouse.

The court in *Frederick Warne & Co. v. Book Sales Inc.*<sup>72</sup> ruled that a trademark could protect a character if the character has obtained a “secondary meaning.”<sup>73</sup> Put differently, “one who encounters the character must immediately associate it with the source.”<sup>74</sup> For example, “Disney has made Mickey Mouse so prominent in all of their corporate dealings that he is the pre-eminent symbol of The Walt Disney Company. There can be little doubt that anyone seeing the image of Mickey Mouse (or even his silhouette) immediately thinks of Disney.”<sup>75</sup> Today, Mickey Mouse is undeniably associated with the Disney brand, and there is no indication that this will change in the future. Thus, Mickey Mouse would pass the test for trademark application with flying colors should it need dual protection to keep it out of the public domain. As such, it is not far-fetched to believe that Mickey Mouse will most likely maintain its trademark indefinitely.

In *Dastar Corp. v. Twentieth Century Fox Film Corp.*, the Supreme Court was faced with the issue of sequential protection and denied an attempt to extend copyright protection through trademark law.<sup>76</sup> Twentieth Century Fox Film Corporation (“Fox”) was granted exclusive television rights to Dwight Eisenhower’s book *Crusade in Europe*.<sup>77</sup> In 1949, Fox produced a television series with the same title; however, it failed to renew the copyright and the series lapsed into the public domain in 1977.<sup>78</sup> In 1988, Fox relicensed the television rights to the book, which included exclusive rights to the television series.<sup>79</sup> Dastar edited the original series and marketed it as its own but did not provide any attributing credit to Fox or the Eisenhower book.<sup>80</sup> Fox

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71. Brett Melson, *6 Benefits of Registering Your Trademark*, HARVARD BUS. SERVS., INC. (Sept. 8, 2020), <https://www.delawareinc.com/blog/six-benefits-of-registering-your-trademark/> [<https://perma.cc/5QSP-XXJX>].

72. 481 F. Supp. 1191 (S.D.N.Y. 1979).

73. *Id.* at 1198.

74. Kaitlyn Hennessey, *Intellectual Property—Mickey Mouse’s Intellectual Property Adventure: What Disney’s War on Copyrights Has to Do with Trademarks and Patents*, 42 W. NEW ENG. L. REV. 25, 34 (2020).

75. *Id.*

76. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 38 (2003).

77. *Id.* at 25.

78. *Id.* at 25–26.

79. *Id.* at 26.

80. *Id.* at 26–27.

sued *Dastar*, alleging copyright infringement of its rights to the Eisenhower book and reverse passing off of the origin of the television series in violation of section 43(a) of the Lanham Act.<sup>81</sup>

The Supreme Court unanimously held that section 43(a) of the Lanham Act, the provision for unregistered trademarks, does not provide a cause of action against a person who uses a public domain work without attribution to the author.<sup>82</sup> In other words, there is no Lanham Act obligation to credit the original creator or copyright owner as the origin of the work. Justice Scalia stated that to find such a right of attribution would create a series of “mutant copyright laws” that would trammel the “federal right to ‘copy and to use’ expired copyrights.”<sup>83</sup> Although, the *Dastar* court cautioned against the use of “mutant copyright laws” it did not provide any practical guidance regarding how to address issues of overlapping copyright and trademark protection.<sup>84</sup> The Supreme Court has yet to clarify this issue, and Congress has not amended the Copyright Act to address the matter.

In the wake of *Dastar*, using trademark law as a workaround to extend the protection of expired copyrights is prohibited.<sup>85</sup> Some commentators suspect that, “with the copyrights on many iconic films and characters poised to expire, Disney and friends will try to get *Dastar* overruled, or at least undermined.”<sup>86</sup> However, it is important to note that *Dastar* is about section 43(a) of the Lanham Act, the provision for *unregistered* trademarks.<sup>87</sup> There is nothing in the *Dastar* opinion about the rights and limitations of *registered* trademarks, which is what Disney presumably holds for *Steamboat Willie* and Mickey Mouse.<sup>88</sup> Additionally, *Dastar* addresses the doctrine of reverse passing off, which is the misrepresentation of another’s goods as one’s own.<sup>89</sup> It does not deal with the opposite doctrine of passing off, where “the defendant deceives consumers into believing that its goods or services are those of the plaintiff.”<sup>90</sup> Therefore, the holding in *Dastar* is

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81. *Id.* at 27.

82. *Id.* at 31.

83. *Id.* at 34 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 165 (1989)).

84. *Id.*

85. *Id.*

86. *Id.* at 29–30.

87. 15 U.S.C. § 1127.

88. *Id.*

89. Lynn McLain, *Thoughts on Dastar from a Copyright Perspective: A Welcome Step Toward Respite for the Public Domain*, 11 U. BALT. INTELL. PROP. L.J. 71, 80 (2003).

90. *Id.*

limited and does not expressly preclude any and all trademarks in copyrighted images that have fallen into the public domain.

Regardless of the holding in *Dastar*, other commentators have suggested that the copyrights in Disney's early films "are void due to publication without proper notice," meaning that the early versions of Mickey Mouse are already in the public domain regardless of any term extensions "because [those] copyrights were never valid."<sup>91</sup> However, none of Disney's copyrights have been voided, making this a weak argument.

Donald P. Harris, an Associate Dean for Temple University Beasley School of Law, said that once Mickey Mouse enters the public domain, "Disney is going to lose millions and a valuable copyright that it's been able to leverage on all sorts of merchandise."<sup>92</sup> In 2021, merchandise licensing and retail sales generated approximately \$5.2 billion for Disney.<sup>93</sup> However, Disney does not specify how much money comes solely from the sales of Mickey Mouse products.<sup>94</sup> Mickey Mouse products are so profitable that people are not waiting until Mickey Mouse enters the public domain to profit off of him.<sup>95</sup> For example, MSCHF, an artwork brand, is currently profiting from a "Famous Mouse" artwork that "will not exist—even as a design—until 2024."<sup>96</sup> However, customers can purchase the token now and redeem it for the actual piece in three years.<sup>97</sup> This is one way that companies are currently profiting from the first version of Mickey Mouse, even though it will not enter the public domain until January 1, 2024. It is worrisome to imagine how this version of Mickey Mouse will be used by other artists and whether they will distort the innocent image of Mickey Mouse in their derivative works. Unfortunately, it is likely that if Mickey Mouse enters the public domain, someone will take this

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91. Douglas A. Hedenkamp, *Free Mickey Mouse: Copyright Notice, Derivative Works, and the Copyright Act of 1909*, 2 VA. SPORTS & ENT. L.J. 254, 255 (2003).

92. Maria Klecko, *Winnie-the-Pooh and Hundreds of Other Works Are Now in the Public Domain*, TEMPLE UNIV.: TEMPLE NOW (Jan. 2, 2022), <https://news.temple.edu/news/2022-01-24/winnie-pooh-and-hundreds-other-works-are-now-public-domain> [<https://perma.cc/82CL-G7UF>].

93. Hugo Martin, *Republicans Took Away Disney's Special Status in Florida. Now They're Gunning for Mickey Himself*, L.A. TIMES (May 12, 2022, 10:15 AM), <https://www.latimes.com/business/story/2022-05-11/mickey-mouse-copyright-expiration-disney-under-attack-republicans> [<https://perma.cc/4QLP-HCQX>].

94. *Id.*

95. Richard Lawler, *MSCHF's Next Project Won't Wait for Mickey Mouse to Enter the Public Domain*, THE VERGE (Aug. 23, 2021, 8:09 AM), <https://www.theverge.com/2021/8/23/22637850/mickey-mouse-mschf-copyright-disney-public-domain> [<https://perma.cc/7LEL-E7NJ>].

96. *Id.*

97. *Id.*

beloved character and turn it into a grotesque version the public no longer identifies with, as was seen with the *Winnie-the-Pooh* characters when they lapsed into the public domain on January 1, 2022.<sup>98</sup>

#### IV. CONSEQUENCES OF WINNIE-THE-POOH ENTERING THE PUBLIC DOMAIN

Winnie-the-Pooh is one of Disney's biggest franchises.<sup>99</sup> However, Walt Disney himself was not the original creator of the literary material; it was author A.A. Milne.<sup>100</sup> Milne was an English author who published the book *Winnie-the-Pooh* in 1926.<sup>101</sup> He was inspired by his son's teddy bear, named "Winnie" after a famous bear at the London Zoo, in combination with the name of a friend's pet swan called "Pooh."<sup>102</sup> Milne created the characters, but they were originally illustrated by Ernest H. Shepard.<sup>103</sup> In the early 1960s, Walt bought permanent licensing rights to the Winnie-the-Pooh ("Pooh") character and his companion characters, which allowed Disney to use the characters in movies, television shows, merchandise, and theme parks.<sup>104</sup> Then, in the early 2000s, Disney purchased the rights to Pooh and his companion characters, making Disney the owner of all intellectual property rights associated with them.<sup>105</sup> However, this was not enough to keep Pooh and his friends out of the public domain.

While Disney may be able to protect Mickey Mouse through trademark law because of the character's acquired secondary meaning in identifying the whole Disney brand, per the ruling in *Frederick*,<sup>106</sup> this approach fell short for Disney's beloved character Pooh.<sup>107</sup> The court's rationale for extending trademark protection to a copyrighted

98. Eddie Makuch, *Winnie the Pooh Horror Movie Is Here to Ruin Your Childhood*, GAMESPOT (May 26, 2022, 7:34 AM), <https://www.gamespot.com/articles/winnie-the-pooh-horror-movie-is-here-to-ruin-your-childhood/1100-6503879/> [<https://perma.cc/5A6V-MQ4U>].

99. *The Real-Life Canadian Story of Winnie-the-Pooh*, CBC KIDS (Aug. 29, 2022), <https://www.cbc.ca/kids/articles/the-real-life-canadian-story-of-winnie-the-pooh> [<https://perma.cc/2Q6X-FVZW>].

100. *Id.*

101. *Id.*

102. *Id.*

103. Corryn Kosik, *E.H. Shepard*, ILLUSTRATION HIST. (June 2018), <https://www.illustrationhistory.org/artists/ernest-howard-shepard> [<https://perma.cc/TNY9-5BCX>].

104. Bruce Orwall, *Disney Agrees to Purchase Rights to Winnie-the-Pooh Characters*, WALL ST. J. (Mar. 5, 2001, 12:01 AM), <https://www.wsj.com/articles/SB983762318200582286> [<https://perma.cc/9J6Z-XQ2H>].

105. *Id.*

106. *Frederick Warne & Co. v. Book Sales Inc.*, 481 F. Supp. 1191, 1198 (S.D.N.Y. 1979).

107. Hennessey, *supra* note 74, at 35.

character lies in the assumption that “[a] character deemed an artistic creation deserving copyright protection . . . may also serve to identify the creator.”<sup>108</sup> Disney may own all the rights to the *Winnie-the-Pooh* characters, but they are not the “creator” of the Winnie-the-Pooh franchise.<sup>109</sup> So, “the only elements that Disney owns as a matter of being the ‘creator’ are the elements they have added.”<sup>110</sup> For example, “the Pooh in the books wears no clothing, but in all of the Disney cartoon versions he wears a red, short-sleeved turtleneck shirt.”<sup>111</sup> Although Disney does own several trademarks for Pooh<sup>112</sup> and one may argue that the public does associate Pooh with the Disney brand, Pooh’s origin made it unlikely to receive dual protection under *Frederick*.<sup>113</sup> As a result, the original *Winnie-the-Pooh* characters entered the public domain on January 1, 2022.<sup>114</sup> Unfortunately, this means that the public may now use the original versions of Pooh and his friends in its own original works and profit from them.

On January 2, 2022, a day after the original book featuring Pooh entered the public domain, Ryan Reynolds, a Canadian American actor best known for his role as the character Deadpool from Marvel Comics, unveiled a Mint Mobile ad campaign featuring “Winnie-the-Screwed,” also called “Edward Bear.”<sup>115</sup> The advertisement begins with Reynolds saying, “This year the original Winnie-the-Pooh becomes public domain. So I think you can see where this is going and I expect that we’ll be hearing from a certain mouse about this Pooh very, very soon.”<sup>116</sup> He then shows a book in the style of Ernest H. Shepard’s original illustrations titled “Winnie-the-Screwed,” in which Pooh is frustrated with his unnecessarily high phone bill from a big mobile phone company.<sup>117</sup> Pooh slams his head hard multiple times

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108. *Frederick Warne & Co.*, 481 F. Supp. at 1196–97.

109. Hennessey, *supra* note 74, at 35.

110. Stephen Carlisle, *Mickey’s Headed to the Public Domain! But Will He Go Quietly?*, NOVA SE. UNIV. (Oct. 17, 2014), <http://copyright.nova.edu/mickey-public-domain/> [<https://perma.cc/AW4V-RCZS>].

111. *Id.*

112. *Id.*

113. *Frederick Warne & Co.*, 481 F. Supp. at 1196–97.

114. The Associated Press, *Winnie the Pooh Enters Public Domain—and Goes Psycho*, THE HILL (Feb. 15, 2023), <https://thehill.com/changing-america/enrichment/arts-culture/3858947-winnie-the-pooh-enters-public-domain-and-goes-psycho/> [<https://perma.cc/P3L9-GHTV>].

115. Ryan Reynolds, *Winnie-the-Screwed*, YOUTUBE (Jan. 2, 2022), <https://www.youtube.com/watch?v=5zx1aSY6k78> [<https://perma.cc/6HSM-N9U6>].

116. *Id.*

117. *Id.*

on a table as he realizes how much he is being charged.<sup>118</sup> The solution to Pooh's problem is switching to Mint Mobile, where he can save money and get a free three-month trial.<sup>119</sup> Less than forty-eight hours in the public domain and Pooh was being used as a sales bear for a mobile phone company.<sup>120</sup> This advertisement was a preview of how a beloved Disney character could be reimagined once it lapsed into the public domain and, sadly, it only continued to get worse.

It did not take long for creators to make use of the out-of-copy-right Pooh and Piglet characters. Pooh and Piglet will hit the big screen again, but it will not be family-friendly.<sup>121</sup> This time, they will make their debut in a horror movie where they appear as the "main villains" and go on a murderous rampage.<sup>122</sup> This slasher movie is called *Winnie-the-Pooh: Blood and Honey*.<sup>123</sup> The plot of the film, according to its writer and producer Rhys Waterfield, is that:

Christopher Robin is pulled away from them, and he's not [given] them food, it's made Pooh and Piglet's life quite difficult.

Because they've had to fend for themselves so much, they've essentially become feral . . . . So, they've gone back to their animal roots. They're no longer tame: they're like a vicious bear and pig who want to go around and try and find prey.<sup>124</sup>

Moreover, in an interview with *Variety*, Waterfield stated, "No one is going to mistake this [for Disney]."<sup>125</sup> However, many people may not know about or understand how copyright law works and thus may associate this movie with the Disney brand, especially given Disney's ever-evolving landscape, which now includes live-action movies based on beloved animated films.<sup>126</sup> It is clear that Waterfield wants

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118. *Id.*

119. *Id.*

120. *Id.*

121. K.J. Yossman, *Winnie the Pooh: Blood and Honey Director Teases Slasher Film Plot: 'Pooh and Piglet Go on a Rampage.'* VARIETY (May 26, 2022, 6:31 AM), <https://variety.com/2022/film/news/winnie-the-pooh-blood-and-honey-director-1235278405/> [<https://perma.cc/6S46-BRJV>].

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. See Mike D. Sykes, II, *Why There's a Disturbing Horror Version of 'Winnie the Pooh' Coming to Theaters, Explained*, FOR THE WIN (May 26, 2022, 2:02 PM), <https://ftw.usa>



the public to make this association since, the first movie trailer begins by saying “The Beloved Childhood Characters . . . Have Turned Wild.”<sup>127</sup> The trailer then proceeds to show Pooh and Piglet gruesomely murder Christopher Robin’s girlfriend by breaking her neck and bashing her head in with a sledgehammer.<sup>128</sup> The trailer also shows the demonic duo sneak up on a woman in a bikini, drug her, tie her up, and drag her body into the middle of the road where they drive a car over her head.<sup>129</sup> Then, multiple college girls are terrorized and killed with machetes and sledgehammers.<sup>130</sup> The trailer is extremely disturbing and a twisted take on a classic childhood story.

### A. Creative Implications

There is no doubt that this distasteful adaptation of a classic childhood story is tarnishing the Disney image—the image of innocent delight. The simple fact that the creators of this film did not use Pooh’s copyrighted red turtleneck does not mean Pooh is distinguishable from Disney’s trademarked property.<sup>131</sup> Disney fans can easily recognize Pooh and Piglet, and they are outraged and “devasted” by this treatment of the characters.<sup>132</sup> They believe “Winnie the Pooh should forever remain ‘sacrosanct.’”<sup>133</sup> Others see this horror movie as being “here to ruin your childhood.”<sup>134</sup> The outpour of negative reactions flooded the internet with a simple teaser; now imagine the reaction and impact this movie will have on the Disney brand image once it is actually released. Some parents may believe Disney released this

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today.com/lists/winnie-the-pooh-horror-movie-blood-and-honey-explained [https://perma.cc/MQ7B-DSRD].

127. Rotten Tomatoes Trailers, *Winnie the Pooh: Blood and Honey Trailer #1*, YOUTUBE (Aug. 31, 2022), [https://www.youtube.com/watch?v=W3E74j\\_xFtg](https://www.youtube.com/watch?v=W3E74j_xFtg) [https://perma.cc/TE99-Q3FS].

128. *Id.*

129. *Id.*

130. *Id.*

131. See Yossman, *supra* note 121.

132. Elizabeth Haigh, ‘Some Things Should Be Sacrosanct!’: Winnie the Pooh Fans React with Outrage to New Horror Film Starring the Honey-Loving Bear as a Serial Killer on the Lookout for Victims in Hundred Acre Wood with His Psychopathic Sidekick Piglet, DAILY MAIL (May 27, 2022, 8:21 AM) <https://www.dailymail.co.uk/news/article-10860173/Winnie-Pooh-horror-film-turns-Piglet-Pooh-sick-serial-killers.html> [https://perma.cc/57T7-6GEZ]; see also Hanifah Rahman, *There’s a New “Winnie the Pooh” Film Coming Soon, and It’s Really Not What I Expected*, BUZZFEED (May 26, 2022), <https://www.buzzfeed.com/hanifahrahman/winnie-the-pooh-horror> [https://perma.cc/D4LU-RXSU] (discussing several Twitter posts from Pooh fans who “aren’t happy that their childhood fave has been altered so drastically” by the horror film).

133. Haigh, *supra* note 132; Rahman, *supra* note 132.

134. Makuch, *supra* note 98.

gruesome movie and may stop supporting Disney products and movies altogether. This also begs the question: What monstrosities will emerge once Mickey Mouse loses its copyright protection, and what impact will that have on Disney's pure and magical image?

### B. Societal Implications

Equally as important to consider is the harm to children and adult consumers from cultural icons, like Pooh, losing their stable and beloved meaning. Many people regard Pooh and his friends as great role models for children because they teach acceptance and normalize differences.<sup>135</sup> For example, a popular interpretation of *Winnie-the-Pooh* is that the characters display symptoms of mental health conditions.<sup>136</sup> Pooh displays characteristics like those of Attention Deficit Hyperactivity Disorder (ADHD), the inattentive subtype, while Tigger displays the impulsive subtype of ADHD.<sup>137</sup> Additionally, Eeyore displays persistent depressive disorder, Piglet displays characteristics of anxiety, and Owl displays signs of dyslexia.<sup>138</sup> As mental health conditions become more pervasive among adults and children alike, using Pooh and his friends can be a useful tool in explaining to children their diagnoses in a relatable and easy-to-understand way.<sup>139</sup> Parents can use Pooh and friends to help their children put labels on what they are feeling and teach them how to accept others even if they are different.

The stories of Pooh and his friends teach children "what acceptance, fair treatment, and equality . . . look like no matter what conditions people live with."<sup>140</sup> For example, no one gets mad at Tigger when he bounces up and down and accidentally knocks something over, we see Eeyore being invited to activities with his friends even when he seems uninterested because of his depression, and no one bullies Owl for his learning disability.<sup>141</sup> This beloved children's story teaches children at a young age about mental health conditions and

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135. Megan Glosson, *Here's How 'Winnie the Pooh' Characters Can Help Kids Understand Mental Illness*, MOMS (Feb. 16, 2022), <https://www.moms.com/winne-pooh-characters-help-kids-understand-mental-illness/> [https://perma.cc/5KDR-8K5Z].

136. Sarah E. Shea et al., *Pathology in the Hundred Acre Wood: A Neurodevelopmental Perspective on A.A. Milne*, 163 CAN. MED. ASS'N J. 1557, 1557-59 (2000).

137. *Id.*

138. *Id.*

139. Glosson, *supra* note 135.

140. *Id.*

141. *Id.*

normalizes them so that children can learn to accept and embrace each other's differences.

These important life lessons are now at risk of being overshadowed by inappropriate uses of Pooh and his friends. For example, once *Winnie-the-Pooh: Blood and Honey* hits the big screen, parents may begin to question Winnie-the-Pooh's underlying value. Instead of regarding Pooh and his friends as wonderful role models that teach acceptance and inclusivity, they may view them as murderers that promote violence. This will ultimately change the image of innocent delight associated with Disney characters and harm children because parents may be less inclined to expose them to the Disney Winnie-the-Pooh stories, which can teach them about mental health and acceptance. This is a prime example of the consequences that arise when creative works lose their copyright protection and cannot find refuge from the public domain under trademark law.

#### V. OPPOSITION TO EXTENDING COPYRIGHT DURATION

The standard justification for intellectual property protection is that the exclusive rights of copyright law provide economic incentives for creators to invest in creating new works. Many intellectual property scholars believe that copyright protections exist primarily to promote creativity and innovation.<sup>142</sup> Theoretically, without intellectual property protection, creators would not be able to recoup the costs of their investment if their creations could be freely copied before or immediately upon publication.<sup>143</sup> The primary argument in favor of extending the copyright term for future works is based on this incentive-to-create rationale: a longer term means that the author will be able to generate more money from her work, thereby increasing the incentive to create the work in the first place.<sup>144</sup> However, there are critics who claim that Disney "has the power to use its government-granted copyright monopoly to create artificial scarcity" and thus hinder creativity and innovation.<sup>145</sup> Nevertheless, loss of creativity in the public domain is not the reason that Republican members of Congress voiced their

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142. See Stacey M. Lantagne, *Building a Better Mousetrap: Blocking Disney's Imperial Copyright Strategies*, 12 HARV. J. SPORTS & ENT. L. 141, 146–47 (2021) (noting that copyright protection allowed for the "ownership over one's creative fruits," shifting the "power of [] censorship away from the government[] into the hands of the authors themselves").

143. See *id.* at 146.

144. Hennessey, *supra* note 74, at 38.

145. Lantagne, *supra* note 142, at 167.

opposition for another copyright term extension—rather, it is a vindictive act against Disney.<sup>146</sup>

*A. Modern Politics and the Mickey Mouse Machine*

Although there is no evidence that Disney is actively seeking further term extension for its intellectual properties, Republican members of Congress have voiced their opposition to further copyright term extension because they want to punish Disney for being a progressive powerhouse.<sup>147</sup> Earlier this year the Republican Party condemned Disney over Disney's opposition to Florida's Parental Rights in Education Law, more commonly known by critics as the "Don't Say Gay" law.<sup>148</sup> This law prohibits "instruction" about sexual orientation and gender identity from kindergarten through third grade "or in a manner that is not age appropriate or developmentally appropriate for students in accordance with state standards."<sup>149</sup> This legislation also gives parents standing to sue a school district if the policy is violated.<sup>150</sup>

After initially remaining silent on the Florida bill, Disney's Chief Executive Bob Chapek spoke out against the legislation, drawing the ire of Florida Governor Ron DeSantis and other Grand Old Party (GOP) leaders, who have condemned what they call Disney's "woke ideology."<sup>151</sup> In a letter to Chapek, seventeen GOP members of Congress expressed that they would not support any legislation to extend Mickey Mouse's expiring copyright protection because of "Disney's political and sexual agenda," as well as Disney's opposition to the Florida "Don't Say Gay" bill and Disney's work with China while filming parts of the movie *Mulan*.<sup>152</sup> United States Representative Jim Banks wrote, "Given Disney's continued work with a Communist Chinese regime that does not respect human rights or U.S. intellectual property and given your desire to influence young children with sexual material inappropriate for their age, I will not support further extension applicable to your copyright."<sup>153</sup> He further accused Disney of

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146. Martín, *supra* note 93.

147. *Id.*

148. *Id.*

149. H.R. 1557, 117th Cong. (2022).

150. Jaclyn Diaz, *Florida's Governor Signs Controversial Law Opponents Dubbed 'Don't Say Gay'*, NPR (Mar. 28, 2022, 2:33 PM), <https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis> [<https://perma.cc/C8K4-EWK5>].

151. Martín, *supra* note 93.

152. *Id.*

153. *Id.*

trying to influence and pervert children by including LGBTQIA+ characters in its films and television shows.<sup>154</sup>

### *B. The Conservative Approach*

Interestingly, it was not long ago since Disney was a company favored by the Republican Party, specifically Governor DeSantis. Governor DeSantis's political action committee accepted more than \$100,000 in campaign contributions from Disney in 2019 and 2021.<sup>155</sup> In retaliation for Disney's Chief Executive Bob Chapek publicly voicing the Company's opposition to the "Don't Say Gay" legislation, Governor DeSantis pushed the state legislature to repeal a law that allowed Disney to operate as a private government over its Florida properties.<sup>156</sup> This move may cost taxpayers several billion dollars to provide infrastructure services that Disney has been paying for the last fifty years.<sup>157</sup>

Other Republican lawmakers have jumped on the anti-Disney bandwagon with a threat to let the Mickey Mouse copyright expire.<sup>158</sup> Senator Josh Hawley proposed a bill, called the Copyright Clause Restoration Act, that would reduce the term of new copyrights to twenty-eight years with a potential renewal of another twenty-eight years from its current duration—the life of the work's author plus an additional seventy years—and would apply this change retroactively to entertainment companies with over \$150 billion in market capitalization.<sup>159</sup> Currently, around seventy companies, including Disney, meet this qualification.<sup>160</sup> A commentator expressed that this bill is a "joke" and violates the Takings Clause of the Fifth Amendment, which states that "private property [shall not] be taken for public use, without just

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154. *Id.*

155. Zoe Strozewski, *Ron DeSantis Took \$100,000 from Disney Before 'Don't Say Gay' War*, NEWSWEEK (Apr. 21, 2022, 11:52 AM), <https://www.newsweek.com/ron-desantis-pac-disney-contributions-1699788> [<https://perma.cc/7GJ3-FVLD>].

156. Martin, *supra* note 93.

157. Robert Frank, *Florida Taxpayers Could Face a \$1 Billion Disney Debt Bomb If Its Special District Status Is Revoked*, CNBC (Apr. 21, 2022, 8:14 PM), <https://www.cnbc.com/2022/04/21/disney-special-district-florida-taxpayers-could-face-a-1-billion-debt-bomb-if-dissolved.html> [<https://perma.cc/JNZ4-V9GM>].

158. Brad Dress, *Hawley Introducing Measure to Strip Disney of Copyright Protections*, THE HILL (May 10, 2022, 12:53 PM), <http://thehill.com/news/senate/3483021-hawley-introducing-measure-to-strip-disney-of-copyright-protections/> [<http://perma.cc/9TY6-FNR>].

159. S. 4178, 117th Cong. (2022).

160. Dennis Crouch, *Copyright Clause Restoration Act of 2022*, PATENTLYO (May 11, 2022), <https://patentlyo.com/patent/2022/05/copyright-clause-restoration.html> [<https://perma.cc/EAD6-XQ5X>].

compensation.”<sup>161</sup> Another commentator pointed out that this bill is a violation of Article I, Section 9, Clause 3 of the Constitution, which states that “*No Bill of Attainder or ex post facto Law shall be passed.*”<sup>162</sup> A bill of attainder is defined as “the legislature effectively targeting an individual, group, or company for punishment, which Senator Hawley in fact did when he targeted Disney.”<sup>163</sup> Additionally, this bill is a violation of international treaties and, although Congress is not bound by any international treaties, passing this legislation may cause international tensions.<sup>164</sup> It is evident that this bill has no merit and is a constitutional violation of existing rights. Thus, this is simply Senator Hawley’s attempt to punish Disney for its progressive ideologies. Punishing a company for political speech is wrong and arguably an abuse of power by Congress. Although Disney is not seeking further term extensions for its intellectual properties, it is evident that if Disney did seek an extension the opposition from Republican members of Congress would have nothing to do with promoting creativity and innovation in the public domain, but rather, it would be a form of punishment.

#### VI. DISNEY SHOULD BE ABLE TO KEEP CHARACTERS LIKE MICKEY MOUSE OUT OF THE PUBLIC DOMAIN

Disney should be able to retain copyright protection for Mickey Mouse indefinitely. Historically, arguments that have been advanced in favor of copyright extension include the following:

- (1) lengthy copyrights are necessary to incentivize the creation of new works;
- (2) copyrighted works are an important source of income—not just to copyright holders, but to the United States at large; and
- (3) copyrights were originally intended to provide income for two generations of descendants—since human lifespan has increased since the original

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161. Sarah Jeong, *Josh Hawley Wants to Punish Disney by Taking Copyright Law Back to 1909 and That Sucks*, THE VERGE (May 10, 2022, 3:12 PM), <https://www.theverge.com/2022/5/10/23066030/hawley-copyright-disney-mickey-mouse> [<https://perma.cc/8ZQU-ESSX>]; U.S. CONST. amend. V.

162. Mike Masnick, *Josh Hawley Introduces Laughably Stupid Copyright Term Reduction Bill*, TECHDIRT (May 11, 2022, 9:33 AM), <https://www.techdirt.com/2022/05/11/josh-hawley-introduces-laughably-stupid-copyright-term-reduction-bill/> [<https://perma.cc/AJE6-SQLP>]; U.S. CONST. art. I, § 9, cl. 3.

163. *Id.*

164. *Id.*

copyright bill in 1790, the copyright term should be appropriately elongated.<sup>165</sup>

The idea behind these arguments is that giving a copyright holder such a long period of protection can provide incentives for people to create works. A person may not want to spend the hours and stress that are required to write a successful book or create a cartoon if she can only profit from the book and cartoon characters for a limited period. However, by allowing a long time for potential marketing and profits, along with spin-offs and sequels, a creator has a bigger incentive to put in the time necessary to make the original product.

*A. Quality of Content: The Value of Long-Term Creative Investment*

Another important factor in favor of copyright extension is that people may not want to invest time and money in building a brand if in a few years others may misappropriate the work and tarnish the brand's image and underlying value. Professor Justin Hughes, a distinguished professor at LMU Loyola Law School, Los Angeles, argues that uncontrolled uses of culturally valuable works will tarnish or debase those works because poorly made or inappropriate versions of the works will affect the public's judgments about the works' quality and meaning and therefore their underlying value.<sup>166</sup> For example, the slasher movie *Winnie-the-Pooh: Blood and Honey* may tarnish Pooh's underlying value. As discussed in Section IV, Pooh's reputation will shift from being a character that promotes acceptance and normalizes differences to one that promotes violence.<sup>167</sup>

As Professor Hughes suggests, mass audiences benefit from having stable iconic characters. Often, iconic characters gain popularity through personification, the notion of endowing animals and other non-human objects with human-like characteristics, because it provides "creative escapism for human beings to think of themselves other-than-in-identity."<sup>168</sup> Animated cartoon characters offer a rich storyline and typically include supporting characters with engaging

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165. Hennessey, *supra* note 74, at 39.

166. Christopher Buccafusco & Paul J. Heald, *Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension*, 28 *BERKELEY TECH. L.J.* 1, 4 (2013).

167. See discussion *supra* Section IV.

168. Sameer Hosany et al., *Theory and Strategies of Anthropomorphic Brand Characters from Peter Rabbit, Mickey Mouse, and Ronald McDonald, to Hello Kitty*, 29 *J. MKTG. MGMT.* 48, 48 (2013).

personalities.<sup>169</sup> Studies have shown that “[c]haracter awareness occurs during adolescence and the imagery remains stored subconsciously for retrieval.”<sup>170</sup> Character stability ensures that the storytelling that forms identities and unifies families is consistent across multiple generations. Parents can bond with their children over the experience of growing up watching the same movies and cartoon characters. It is a unique phenomenon that, even when people are gone, the memory of them is maintained through shared characters, places, and stories. Therefore, it is very important that Disney preserves a stable meaning of its characters so that it can continue to promote a rich culture that has become a multigenerational identifier and unifier.

Some scholars are concerned that new works deriving from and based on materials in the public domain will be under-produced.<sup>171</sup> A perfect example is the *Winnie-the-Pooh: Blood and Honey* slasher movie. In an interview with *Variety*, the movie director said that the audience “shouldn’t be expecting this to be a Hollywood-level production.”<sup>172</sup> Yet, those who do not understand the workings of copyright law may confuse this slasher movie for a Disney production. Not only may the consumers question Disney’s morals and values after seeing Pooh and Piglet viciously murder innocent victims, but they may also wonder why Disney, a renowned production studio, produced such a poor-quality film. As Professor Hughes argues, unauthorized uses diminish the value of the product—not just to the creator, but to the public as well.<sup>173</sup> This movie produces the polar opposite of the warm and fuzzy feelings that audiences experience when watching Disney’s high-level productions; on the contrary, it has a chilling effect. Thus, poorly made and inappropriate derivative works of Disney’s cartoon characters may ultimately dilute and tarnish the Disney brand and its underlying value, and, most importantly, diminish the quality of content that consumers receive.

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169. *Id.* at 50.

170. *Id.* at 51.

171. See Jane C. Ginsburg et al., *The Constitutionality of Copyright Term Extension: How Long Is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 692–93 (2000).

172. Yossman, *supra* note 121.

173. Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 926, 941 (1999).



*B. Diminishing Returns: How Losing Copyright Protection Will Be Detrimental for Working Class Families*

The dilution of the Disney brand is a problem, not only for Disney and its consumers, but also for the working-class families that depend on their Disney jobs to make a living. United States Representative Lou Correa, whose Orange County district includes Disneyland, said he disagrees with the efforts by Representative Jim Banks and others to “‘connect civil rights issues with business issues’ and vowed to back any legislation to protect Mickey Mouse’s copyright if it comes before the House of Representatives.”<sup>174</sup> Representative Correa said that protecting the Mickey Mouse copyright ensures that Disney can continue to capitalize on the character in the United States: “What is most important to me is protecting those jobs in the United States.”<sup>175</sup> As of 2020, Disney boasts over 203,000 employees worldwide, which was an 8.97 percent decline from 2019, when it employed 223,000 people.<sup>176</sup> Thousands of working-class families may suffer if Disney has to reduce its workforce due to its brand’s dilution and loss of business as a result of losing copyright protections for its most iconic characters.

*C. Quieting Critics’ Concerns Over Disney’s “Monopoly”*

Many critics argue that Disney should not be able to extend its copyright terms for iconic characters like Mickey Mouse because it holds a monopoly that harms creativity in the public domain.<sup>177</sup> One copyright scholar, Dennis Karjala, condemns another copyright term extension by arguing that “the extensions are corporate welfare, plain and simple—and they have caused a lot of harm to the general public.”<sup>178</sup> Karjala further contends that copyright extensions “have limited the public’s freedom to make derivative works, serve only to boost corporate profits for an elongated period of time, and create a wealth transfer from the United States public to current copyright holders through the continued payment of extended copyright royalties. He argues that “[t]hese copyright owners are in most cases large companies and, in any case, may not even be descendants of the original

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174. Martín, *supra* note 93.

175. *Id.*

176. *Disney: Number of Employees 2010-2022 | DIS*, MACROTRENDS, <https://www.macrotrends.net/stocks/charts/DIS/disney/number-of-employees> [<https://perma.cc/GF8N-C5KK>].

177. See Greener, *supra* note 55, at 606–09.

178. Hennessey, *supra* note 74, at 39–40.

authors whose works created the revenue streams that started flowing many years ago.”<sup>179</sup>

A monopoly, by definition, is “the complete control of trade in particular goods or of the supply of a particular service; a type of goods or a service that is controlled in this way.”<sup>180</sup> Disney is not the only animation studio in existence,<sup>181</sup> therefore, by definition, Disney is not a monopoly. Moreover, although it may be true that Walt Disney’s family does not own a majority share in the Company, they have actively chosen to stay out of the business and focus their energy and efforts on philanthropy.<sup>182</sup> They currently own approximately 3 percent of the whole company, which seems relatively insignificant; however, according to the Company’s 2021 fiscal report, it exceeded \$67 billion in revenue.<sup>183</sup> Walt’s family’s stake in the company allows them to do what they are passionate about and serve marginalized communities.<sup>184</sup> Moreover, Disney is committed to charitable giving through grants specifically directed toward historically underrepresented communities.<sup>185</sup> In 2022, Disney donated over \$233 million to various philanthropic causes, including protecting the environment and wildlife, increasing access and opportunities for underrepresented communities, and to children facing serious illness.<sup>186</sup> Thus, it is inaccurate to say that the copyright extensions have “caused a lot of harm to the general public,” as copyright scholar Karjala stated.<sup>187</sup>

While the primary objective of copyright is “to promote the progress of science and useful arts,”<sup>188</sup> copyright protection does not extend to any idea, procedure, system, method of operation, concept,

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179. *Id.* at 40.

180. *Monopoly*, OXFORD LEARNER’S DICTIONARIES, [https://www.oxfordlearnersdictionaries.com/us/definition/american\\_english/monopoly](https://www.oxfordlearnersdictionaries.com/us/definition/american_english/monopoly) [<https://perma.cc/Q2MY-3KR4>].

181. Miguel Viduare, *The Best Animation Studios in the World Outside of Disney & Pixar*, N.Y. FILM ACAD. (Apr. 26, 2019), <https://www.nyfa.edu/student-resources/best-animation-studios/> [<https://perma.cc/PF8L-U2FT>].

182. Ade Adeniji, *How Multiple Generations of the Disney Family Come Together to Fund Social Justice in LA and Beyond*, INSIDE PHILANTHROPY (Dec. 22, 2021), <https://www.insidephilanthropy.com/home/2021/12/22/how-multiple-generations-of-the-disney-family-come-together-to-fund-social-justice-in-la-and-beyond> [<https://perma.cc/4F9D-X94U>].

183. *Id.*

184. *Id.*

185. *World of Hope*, WALT DISNEY CO., <https://impact.disney.com/charitable-giving/> [<https://perma.cc/V8FB-E93K>].

186. *Id.*

187. Hennessey, *supra* note 74, at 39–40.

188. U.S. CONST. art. I, § 8, cl. 8.

principle, or discovery.<sup>189</sup> To this end, copyright law assures authors the right to their original expression for a certain period and encourages others to build freely upon the ideas and information conveyed by a work. However, an individual that recycles someone else's creative expression for her own personal gain is not promoting creativity. The underlying ideas in Disney's creative works are not protected by copyright law; an individual may theoretically create countless cartoons or books about a mouse without any identical plots or characters.<sup>190</sup> Thus, it is unnecessary for the public to be able to use the character of Mickey Mouse specifically to create new works. Moreover, opponents of extending copyright protection fail to realize that the public benefits from Disney's control over Mickey Mouse because it makes the cartoon character more valuable and sought after.<sup>191</sup> Disney has invested large amounts of money to build its brand around Mickey Mouse and therefore deserves to benefit economically from others' use of the character.

## VII. POTENTIAL ACTIONS BY DISNEY TO RETAIN COPYRIGHT PROTECTION FOR THE FIRST VERSION OF MICKEY MOUSE

### A. *Disney Can Lobby Congress to Extend the Copyright Duration Term*

In the past, Congress has been persuaded more than once by Disney and others to extend copyright protection terms.<sup>192</sup> However, it is believed by some scholars that due to the changing political climate it is unlikely that Disney will be able to influence Congress to extend copyright duration once again.<sup>193</sup> Their reasoning is that there now exists a "well-organized grassroots lobby against copyright expansion."<sup>194</sup> Further, the need for continued innovation and creativity is an important public policy concern that weighs in favor of no longer

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189. *Ideas, Methods, or Systems*, U.S. COPYRIGHT OFF. (2021), <https://www.copyright.gov/circs/circ31.pdf> [<https://perma.cc/J5CU-4ZGL>].

190. *Compare, e.g.*, STEPHENIE MEYER, *TWILIGHT* (2005) (story about a human who falls in love with a vampire), with RICHELLE MEAD, *VAMPIRE ACADEMY* (2007) (story about a half-vampire, half-human girl training to be the guardian of her best friend, a vampire princess).

191. See Amy Harmon, *Debate to Intensify on Copyright Extension Law*, N.Y. TIMES (Oct. 7, 2002), <https://www.nytimes.com/2002/10/07/business/debate-to-intensify-on-copyright-extension-law.html> [<https://perma.cc/DDK2-SEBX>].

192. See *Extension of Copyright Terms*, U.S. COPYRIGHT OFF. (2021), <https://www.copyright.gov/circs/circ15t.pdf> [<https://perma.cc/F2ST-ZLV8>].

193. Lee, *supra* note 60.

194. *Id.*

extending copyright protection terms.<sup>195</sup> However, as discussed above, the political tensions underlying extended protection are due to Republican politicians' disapproval of Disney's progressive ideologies.<sup>196</sup> If Disney can regain the support of Republican leaders and persuade Congress that a longer-term extension of the copyright for Mickey Mouse will benefit not only Disney and its consumers, but also thousands of working-class families and in turn the economy, then maybe Congress will be inclined to consider this proposal.

*B. Disney Can Attempt to Have Dastar Overruled or  
At Least Undermined*

Although it is not certain that *Steamboat Willie* and the first version of Mickey Mouse will enter the public domain, it is entirely possible that Disney is protecting Mickey Mouse in another subtle way. Several years ago, Disney began to insert snippets of Mickey Mouse in the *Steamboat Willie* cartoon at the beginning of many modern Walt Disney Animation Studio movies, including *Tangled*, *Frozen*, and *Moana*.<sup>197</sup> This strategic move may establish the 1928 version of Mickey Mouse and the *Steamboat Willie* cartoon as a modern Disney logo or trademark, which would remain protected even if the copyright expires.<sup>198</sup> The idea is that if consumers associate *Steamboat Willie* with Disney goods or services, then others using it in the public domain may cause confusion, thus infringing on Disney's trademark protection. This seems to be Disney's backup plan in case Mickey Mouse is not granted dual protection.

As discussed in Section III, the holding in *Dastar* will not directly block Disney's trademark of Mickey Mouse once its copyright protection expires.<sup>199</sup> As such, Mickey Mouse will likely benefit from dual protection because of its acquired secondary meaning. However, if *Dastar* does pose a problem for Disney in the future, Disney can attempt to have the decision from *Dastar* overruled, amended, or undermined through further lobbying efforts, new case law, or other creative avenues. Having the Court revisit the decision from *Dastar* may provide beneficial guidance on how to address the issue of overlapping

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195. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photographs, and Computer Programs*, 84 HARV. L. REV. 281, 325 (1970).

196. Martin, *supra* note 93.

197. *Id.*

198. *Id.*

199. See discussion *supra* Part III.

copyright and trademark protections. It may also encourage Congress to amend the Copyright Act to address the matter and clarify when dual copyright-trademark protection may be utilized and to what extent. This approach is likely to be time-consuming and expensive, resulting in years of litigation. However, conducting a cost-benefit analysis that weighs the cost of litigation against the revenue that will be lost if Disney loses the exclusive copyrights to *Steamboat Willie*, Mickey Mouse, and other cartoon characters may be persuasive enough for Disney to pursue this option.

If this approach is too time-consuming, however, more copyrights may expire. For example, Mickey Mouse's friends Pluto and Donald Duck first made their debuts in the 1930s, meaning their copyrights are due to expire in a few years.<sup>200</sup> It will be unfortunate if more creative works fall into the public domain before they can be saved. Additionally, any changes to the law need to be applied retroactively otherwise these efforts will be in vain, since the updated laws will not apply to Mickey Mouse or Disney's earlier works.

*C. Disney Can Lobby Congress to Pass Legislation That Resembles Mexico's Article 173 of the Federal Copyright Law*

As case law stands today, Mickey Mouse may benefit from dual copyright-trademark protection due to its acquired secondary meaning. Unfortunately, this dual protection will not apply to a vast majority of Disney's characters unless they are deemed to have established sufficient secondary meaning. Moreover, when Mickey Mouse's copyright protection expires, the extent of protection for it under only trademark law will become more limited because trademark and copyright law protect different things.<sup>201</sup> Even if all of Disney's characters were protected to the full extent under trademark law, this protection would not be the same as being protected to the full extent of copyright law.

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200. Charlotte Elton, *Disney Could Soon Lose Exclusive Copyright Over Mickey Mouse, but There Are Caveats*, CULTURE NEWS (July 7, 2022), <https://www.euronews.com/culture/2022/07/07/disney-could-soon-lose-exclusive-copyright-over-mickey-mouse-but-there-are-caveats> [<https://perma.cc/2QZR-LMWJ>].

201. *Trademark, Patent, or Copyright*, U.S. PAT. & TRADEMARK OFF. (June 13, 2022, 5:32 PM), <https://www.uspto.gov/trademarks/basics/trademark-patent-copyright> [<https://perma.cc/X6L6-HP7R>].

There is a unique right in Mexico's Federal Copyright Law called "La Reserva de Derechos," or the "reservation of rights."<sup>202</sup> The reservation of rights is an exclusive right that entitles the title holder to the exclusive use and exploitation of titles, names, designations, distinctive physical and psychological characteristics, or original or operational characteristics, as applied, according to their nature, to any of the following subject matter: (1) titles of serial publications, whether printed or electronic; (2) names of television or radio shows; (3) artistic names of individuals or groups; (4) typical real-life human, fictional, or symbolic characters; and (5) original advertising formats.<sup>203</sup> A reservation of rights for the names and distinctive physical and psychological characteristics of characters—both human and fictional or symbolic—is valid for a period of five years from the date of issue and can be renewed by successive five-year periods indefinitely.<sup>204</sup> Additionally, the reservation of rights title-holder can authorize or prohibit third parties from copying or imitating titles, names, characters, or promotions.<sup>205</sup> The infringement administrative procedure for a reservation of rights is carried out by the Instituto Mexicano de la Propiedad Industrial (the Mexican Institute of Industrial Property), not the Instituto Nacional del Derecho de Autor (INDAUTOR).<sup>206</sup> The Mexican Institute of Industrial Property (or IMPI, for its Spanish acronym) is responsible for overseeing the patent and trademark registration process as well as the administrative enforcement of intellectual property infringement, whereas INDAUTOR manages copyright registrations and administers disputes between copyright holders.<sup>207</sup> This indicates that a reservation of rights is considered to be more of a property interest, rather than simply a certificate of authorship.<sup>208</sup> The copyright certificate provides the creator with acknowledgment of her authorship and signals to the public that

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202. Ley Federal de Derechos de Autor [LFDA], Artículo 173, Diario Oficial de la Federación [DOF] 24-12-1996, últimas reformas 07-01-2020 (Mex.).

203. *Id.*

204. Ley Federal de Derechos de Autor [LFDA], Artículo 191, Diario Oficial de la Federación [DOF] 24-12-1996, últimas reformas 07-01-2020 (Mex.).

205. *Preguntas Frecuentes de Dirección Reserva de Derechos*, GOBIERNO DE MEXICO, <https://www.indautor.gob.mx/preguntas-frecuentes-reservas.php> [<https://perma.cc/MT2T-HU9F>].

206. *Understanding Intellectual Property Rights in Mexico*, NAPS (Aug. 27, 2020), <https://napsintl.com/mexico-manufacturing-news/understanding-intellectual-property-rights-in-mexico/> [<https://perma.cc/XAX6-T6CK>].

207. *Id.*

208. Juan Carlos Ortiz Rico, *Intellectual Property: Differences Between Industrial Property and Copyright*, MIER ESPARZA ABOGADOS (Oct. 29, 2019), <https://mieresparza.com/en/la-propiedad-intelectual-propiedad-industrial-y-derechos-de-autor/> [<https://perma.cc/M5XR-RNKG>].

there is no similar work recorded in INDAUTOR's records, whereas registration with IMPI allows the individual to acquire property rights.<sup>209</sup> These property rights grant the individual legal protection from a third party's unauthorized use of the registered work.<sup>210</sup>

The application process for a reservation of rights for human and fictional characters is straightforward. An applicant must fill out the specific forms—here it is the RD-01-02 form with the RD-07 form attached—and then submit them to INDAUTOR.<sup>211</sup> The RD-07 form requires an applicant to establish the psychological characteristics of the character, as well as provide an image or drawing of the character and indicate in a detailed manner the physical characteristics that are observed on the image the applicant provided.<sup>212</sup> An applicant may also elect to simply request from INDAUTOR a general informative-only opinion about the registrability of the reservation of rights for his specific work.<sup>213</sup> The result of INDAUTOR's opinion is only informative, so it does not confer any rights to the applicant, nor does it obligate INDAUTOR to grant the reservation of rights or bypass the formal procedure for obtaining it.<sup>214</sup> The process to request an opinion from INDAUTOR resembles that of applying for the reservation of rights itself; the applicant must submit the RD-01-02 form with the RD-07 form attached.<sup>215</sup> The applicant must also provide a photograph or drawing of the character, a description of its physical and psychological characteristics, the character's full name (without abbreviations), the signature of the applicant or his legal representative, the place, and the date.<sup>216</sup>

A reservation of rights for a fictional character is broader in scope than trademark rights. For example, trademarks can be protected under other intellectual property rights, such as copyright, industrial designs, and the reservation of rights.<sup>217</sup> Oftentimes, a reservation of rights is used as an alternative when a trademark registration is denied or as

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209. *Id.*

210. *Id.*

211. Ley Federal de Derechos de Autor [LFDA], Artículo 173, Diario Oficial de la Federación [DOF] 24-12-1996, últimas reformas 07-01-2020 (Mex.).

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. Abraham Díaz & Adrian Martinez, *Trademarks in Mexico*, LEXOLOGY (Jan. 1, 2019), <https://www.lexology.com/library/detail.aspx?g=c0359736-1c79-42e2-b9a5-af5391680203> [<https://perma.cc/CLZ3-DM93>].

additional protection for a trademark.<sup>218</sup> In Mexico, obtaining accumulated protection for trademarks under other intellectual property rights is not prohibited; on the contrary, it is encouraged, since each intellectual property mechanism protects different elements and rights of the work.<sup>219</sup>

Mexico has taken great steps toward creating robust intellectual property protection and enforcement mechanisms through legal provisions that modernize intellectual property rights.<sup>220</sup> The reservation of rights in Mexico in some ways resembles several U.S. copyright doctrines designed to protect important characters, namely: (1) the story being told; and (2) sufficient delineation. The story being told test is a dominant framework that was established when the Ninth Circuit ruled that a character can be subject to copyright protection only if it “constitutes the story being told.”<sup>221</sup> In other words, the character must be central to the story and not simply a “mere vehicle” for carrying the story forward.<sup>222</sup> The sufficient delineation framework established that the less developed a character is, the less likely it will be to receive copyright protection.<sup>223</sup> However, a key distinction between Mexico’s reservation of rights and these U.S. copyright doctrines is that the reservation of rights does not require the previous existence of a protected work to grant protection to the character. This allows special human characters like luchadores (wrestlers), who are very popular in Mexican culture, to establish intellectual property protections for their images. This right resembles the California right of publicity, which grants a natural person the right to commercially exploit their persona, name, likeness, and voice, and to prevent unauthorized commercial uses of it.<sup>224</sup> However, the California statute falls short because it does not protect human *characters*, only readily identifiable people.

Currently, in the United States, the intellectual property protections offered to characters are inferior to the protections offered by Mexico’s Federal Copyright Law. The United States should adopt federal intellectual property protections that resemble Mexico’s reservation of rights. As discussed above, Mexico’s reservation of rights

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218. *Id.*

219. *Id.*

220. *Understanding Intellectual Property Rights*, *supra* note 204.

221. *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954).

222. *Id.*

223. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

224. CAL. CIV. CODE § 3344 (2022).



creates more of a property interest rather than simply providing a certificate of authorship. Similarly, in the United States trademarks are constitutionally protected private property under the Takings Clause of the Fifth Amendment.<sup>225</sup> This gives the trademark owner a property interest in the goodwill underlying his mark.<sup>226</sup> Additionally, trademarks in the United States are already afforded robust term protection under the Constitution.<sup>227</sup> Thus, like trademark law, the framework needed to be able to offer indefinite renewable protection to typical real-life human, fictional, or symbolic characters will also find its basis in the U.S. Constitution.

This framework will create a “hybrid” between copyright and trademark law that aims to protect typical real-life human, fictional, or symbolic characters from falling into the public domain. Disney and other cartoon creators will be able to renew their reservation of rights on characters indefinitely for five-year periods as long as they provide formal proof of the reserved right’s use a month before its expiration.<sup>228</sup> This will grant all of Disney’s characters indefinite copyright protection without relying on a character’s acquisition of secondary meaning. Thus, Mickey Mouse and other beloved Disney characters will remain Disney’s property indefinitely and will not fall into the public domain.

#### CONCLUSION

In recent years, the dominant discourse in copyright scholarship has been against extending copyright duration. Although Disney is not actively seeking further copyright extension to protect the *Steamboat Willie* cartoon and the first version of Mickey Mouse, Republican members of Congress have voiced their opposition as a way to punish Disney for its progressive ideologies, not as a way to increase creativity in the public domain. This vendetta has the power to affect not only Disney but also consumers because inappropriate uses of works that lapse into the public domain will dilute and tarnish Disney’s image and underlying value and the quality of content that consumers receive. The ramifications of cultural icons—like Pooh and Piglet—losing their stable meanings may have a detrimental impact on society.

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225. Dustin Marlan, *Trademark Takings: Trademarks as Constitutional Property Under the Fifth Amendment Takings Clause*, 15 U. PA. J. CONST. L. 1581 (2013).

226. *Id.*

227. 15 U.S.C. § 1059.

228. Elton, *supra* note 200.

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## DISNEY'S EXPIRING COPYRIGHTS

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The *Winnie-the-Pooh* characters have historically helped children to understand their mental health diagnoses and embrace differences. However, if the underlying value of Winnie-the-Pooh shifts from promoting diversity and inclusion to promoting violence, then parents may be less inclined to expose their children to Disney's version of *Winnie-the-Pooh*.

Although it is extremely likely that on January 1, 2024, the first version of Mickey Mouse will not lose all the intellectual property protections it has been granted, this date marks the beginning of a steep expiration slope—not just for Mickey Mouse, but for Disney's entire cast of characters. With this date on the horizon and the likelihood that not all of Disney's characters will be able to seek refuge in trademark law to prevent them from lapsing into the public domain, Disney needs to be proactive in seeking creative ways to protect its intellectual properties. In the past, Disney has successfully convinced Congress to extend copyright duration terms multiple times. However, with today's changing political environment surrounding copyright extension and the Republican Party's treatment of Disney, it seems unlikely that Disney will succeed in influencing Congress to extend the copyright term yet again. A creative approach is to create separate protection for real-life human, fictional, or symbolic characters that is modeled after Mexico's reservation of rights. Such a framework will grant all of Disney's characters copyright protection for indefinite, successive five-year periods, as long as Disney continues to use them. Although Disney has not publicly announced its plans to save Mickey Mouse and other beloved characters, Disney still has time to surprise us before the clock strikes midnight. We will have to wait and see how this story ends . . . or continues!

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