

**Seton Hall University**  
**eRepository @ Seton Hall**

---

Law School Student Scholarship

Seton Hall Law

---

5-1-2014

# Saving Mickey Mouse: The Upcoming Fight FOR Copyright Term Extension In 2018

Kaitlyn Rose Bernaski

Follow this and additional works at: [https://scholarship.shu.edu/student\\_scholarship](https://scholarship.shu.edu/student_scholarship)

---

## Recommended Citation

Bernaski, Kaitlyn Rose, "Saving Mickey Mouse: The Upcoming Fight FOR Copyright Term Extension In 2018" (2014). *Law School Student Scholarship*. 439.

[https://scholarship.shu.edu/student\\_scholarship/439](https://scholarship.shu.edu/student_scholarship/439)

# SAVING MICKEY MOUSE: THE UPCOMING FIGHT FOR COPYRIGHT TERM EXTENSION IN 2018

Kaitlyn Bernaski

Seton Hall University School of Law

## *Abstract*

*This article argues that copyright terms should be extended again in 2018, when the current copyright statute calls for some copyrighted works of film, music, and literature to start entering the public domain, and when Congress is to decide on the future of copyright term extension. Term extension has been a hot topic among copyright owners for years, and lobbying efforts by copyright owners have pushed terms to be extended in 1831, 1909, 1976, and in 1998. Proponents of extension argue that additional protection incentivizes copyright owners to restore older works, disseminate them to the public, and continue to create new works. A fear exists that works in the public domain will be tarnished and exploited. Those who argue against copyright term extension claim that current copyright protection is more than sufficient to protect copyright's purpose of encouraging creativity and unfairly grants the author a monopoly on his copyright for an extensive amount of time.*

*This article explores the copyright extension battle, particularly through the involvement of the Disney Corporation, a major proponent and lobbyist of copyright extension through the years. It reviews related Supreme Court decisions to demonstrate the procedural history of copyright term extension. This article traces Disney's participation in the successful fight to extend copyrights, as well as the expected lobbying efforts of copyright owners as 2018 approaches. It also analyzes the arguments for extension and for copyright reform, and what either decision would mean for copyright owners, focusing on the effect changes would have on large-quantity copyright holders such as Disney. Finally, the article concludes that Congress should grant copyright extension in 2018 by taking various measures, and particularly for copyrights that are still in use by their respective authors.*

## I. INTRODUCTION

In October 1998, the Sonny Bono Copyright Term Extension Act ("CTEA") was signed into law, granting copyright owners extended copyright terms in various ways for older works, new works, and works of corporate authorship.<sup>1</sup> One noteworthy provision included increasing the duration of copyright protection for works published before January 1, 1978 for an additional

---

<sup>1</sup> Eldred v. Ashcroft, 537 U.S. 186, 226 (2003) (explaining the passage of the Copyright Extension Act of 1998).

twenty years.<sup>2</sup> This meant that copyright owners of older works would have copyright protection until 2018, when Congress will inevitably face a similar debate of whether terms should be extended again.<sup>3</sup> The Disney Corporation was heavily involved as a proponent of term extension, as Mickey Mouse and some of Disney's other prominent copyrights would have entered the public domain without passage of the 1998 Act.<sup>4</sup> As 2018 draws closer, the battle for copyright term extension is expected to reignite, and term extension should be granted again, as copyright owners should reap the benefits of their contributions to society, and future works continuously need to be incentivized.

This article explores the long-debated issue of copyright term extension, and why copyright terms should be altered and extended. Part II examines the long history of the copyright term extension battle. The change in copyright terms over the years will be discussed, from the Copyright Act of 1790, Copyright Act of 1831, Copyright Act of 1909, and Copyright Act of 1976, along with more recent modifications to copyright terms.

In 1998, Disney faced the loss of their arguably most-famous copyright, Mickey Mouse, and thus began their participation as one of the prominent lobbyists for copyright term extension.<sup>5</sup> Part III examines Disney's involvement in the most recent fight for extended copyright terms. In 2018, Disney, and many other copyright owners, will face the same problem and will most likely lobby extensively for another term extension.<sup>6</sup> Disney should undoubtedly push for another law along the lines of CTEA to further the duration of their copyright terms.

---

<sup>2</sup> *Id.*

<sup>3</sup> Laurie Richter, *Reproductive Freedom: Striking A Fair Balance Between Copyright and Other Intellectual Property Protections in Cartoon Characters*, 21 ST. THOMAS L. REV. 441, 451 (2009) ("In just two (2) years, Disney spent more than \$6.3 million on the cause, and it appears to have paid off since the result was the creation of the CTEA.").

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Christina N. Gifford, *The Sonny Bono Copyright Term Extension Act*, 30 U. MEM. L. REV. 363, 383 (2000) ("Due to the enactment of the CTEA, no new works will fall into the public domain until the year 2018.")

Part IV examines the Act in detail, starting with its introduction in the Senate on March 20, 1997.<sup>7</sup> Those in favor of the bill argued that term extension was necessary due to increased human life expectancy, longer copyright terms in Europe that the United States needed to match to simplify the international entertainment industry, and to encourage the creation of works that would otherwise not be produced under the existing limited copyright terms.<sup>8</sup> Opponents argued that term extensions were not necessary to promote the progress of science and the useful arts and that most works receive the majority of the profits that they will make within the first few years of creation.<sup>9</sup> Despite this opposition, the Act passed the Senate and the House on October 7, 1998, and was signed into law by President Clinton on October 27, 1998.<sup>10</sup>

Following the passage of the Act in 1998, the opponents to copyright extension continued their fight, all the way to the United States Supreme Court.<sup>11</sup> Part V examines the case of *Eldred v. Ashcroft*, in which the Court decided upon a challenge to the Act based on constitutional grounds. The challenge was based on the argument that the Constitution's Copyright Clause gives Congress the power to promote the progress of science and useful arts by granting copyrights for limited times.<sup>12</sup> The Court sided with the proponents of term extension, holding that the twenty-year term extension did not violate the Copyright Clause, mostly based on the interpretation that the Clause intended Congress to set a limit for copyright terms – but no constitutional restriction exists for how long that limit can be.<sup>13</sup>

---

<sup>7</sup> S. 505 (105<sup>th</sup>): Sonny Bono Copyright Term Extension Act, 105<sup>th</sup> Congress, 1997-1998.

<sup>8</sup> Yemi Adeyanju, *The Sonny Bono Copyright Term Extension Act: A Violation of Progress and Promotion of the Arts*, 2003 SYRACUSE L. & TECH. J. 3. (2003).

<sup>9</sup> *Id.*

<sup>10</sup> The Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.).

<sup>11</sup> *Eldred*, 537 U.S. at 186.

<sup>12</sup> *Id.* at 186.

<sup>13</sup> *Id.* at 189. U.S. Const. art. I, § 8, cl.8

While the copyright term extension battle has been silenced for a number of years, as 2018 grows closer, the arguments for and against further term extension will inevitably begin again. Part VI will analyze the benefits of copyright term extension and the argument for further extension, as well as the pitfalls of term extension, and explain why terms should be altered and extended again in 2018. Copyright terms should be extended for a number of reasons in 2018, including the fact that people are living longer and should be able to enjoy the fruits of their labor, companies are existing longer, and there is more of a possibility now than ever before for inferior copies of copyrighted works to be made and distributed with modern technology.

Part VII suggests how copyright terms should be extended and altered to further protect authors of copyrighted works. While creators currently receive a certain amount and duration of protection, many copyrighted works that would potentially enter the public domain soon are still used by the companies or authors who created them, and for a large profit. In modern times, where companies, as well as people, are enduring longer and there is more access and dissemination of works, there is a serious need for copyright protection – and for it to be a lengthy protection. The Supreme Court has already held that the Constitution does not state *what* limit must be placed on copyrights, but just that there needs to be a limit of some sort.<sup>14</sup> By taking certain measures, Congress can ensure that copyright owners and the public receive the best result.

Part VIII concludes, summarizing the evolution of the copyright term extension battle and the likely future of it, and how copyright protection should be expanded to further the goals of copyright law.

## II. HISTORY OF THE COPYRIGHT TERM EXTENSION BATTLE

---

<sup>14</sup> *Id.*

The Copyright Term extension battle has waged for years, with copyright statutes changing multiple times, always extending terms. The Copyright Act of 1790 was the first statute that provided for specific copyright terms.<sup>15</sup> In 1831, the first general revision to the Act of 1790 was enacted, extending copyright terms.<sup>16</sup> Decades later, the Copyright Act of 1909 amended and consolidated previous copyright statutes.<sup>17</sup> Lastly, the current statute is the Copyright Act of 1976, which was later amended by the Digital Millennium Copyright Act and the Copyright Term Extension Act.<sup>18</sup> Through the years, copyright terms have been altered as an ever-changing part of our laws.

The Copyright Act of 1790 was the first copyright statute in the United States.<sup>19</sup> The Act provided a copyright term lasting fourteen years from the date of publication.<sup>20</sup> That term was then renewable for an additional fourteen years, but only if the work's author survived the first term.<sup>21</sup> This renewable term applied to works that were already published, works that had been created but were not published, and future works, and certain formality requirements were created for copyrights.<sup>22</sup> This Act marked the first time that works would be protected under copyright.

In 1831, the Copyright Act was amended for the first time.<sup>23</sup> The original copyright term was extended from fourteen years to twenty eight years from the date of publication, with an option to renew the copyright for another fourteen years.<sup>24</sup> Also, musical compositions became

---

<sup>15</sup> See Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790 Act).

<sup>16</sup> See Act of Feb. 1831, ch. 16, 4 Stat. 436 (repealed 1870).

<sup>17</sup> See Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (repealed 1976).

<sup>18</sup> See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

<sup>19</sup> See 1 Stat. 124.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See Act of Feb. 1831, ch. 16, 4 Stat. 436 (repealed 1870).

<sup>24</sup> Victoria A. Grzelak, *Mickey Mouse & Sonny Bono Go to Court: The Copyright Term Extension Act and Its Effect on Current and Future Rights*, 2 J. MARSHALL REV. INTELL. PROP. L. 95, 99 (2002) (discussing the 1831 Act).

statutorily protected works.<sup>25</sup> Furthermore, the statute of limitations on copyright actions was increased from one to two years, and formality requirements were altered.<sup>26</sup> The Copyright Act of 1831 marked the first of a handful of amendments to the Act.

The next major revision of the Copyright Act occurred in 1909.<sup>27</sup> Copyright terms were maintained at twenty-eight years from publication, but the renewable term of protection was extended from fourteen years to twenty-eight years.<sup>28</sup> This Act also created two systems of copyright protection.<sup>29</sup> State laws protect unpublished works, and original, published works with a notice of copyright affixed would be protected under federal copyright law.<sup>30</sup> If a published work did not have a notice of copyright affixed, the work would not be protected and would enter the public domain.<sup>31</sup> The public domain contains the “facts, ideas, and concepts which cannot be protected by copyright.”<sup>32</sup> These changes in 1909 created a growing evolution of copyright law.

The Copyright Act was next amended in 1976, and this version, with some slight changes, remains in effect today.<sup>33</sup> Under the Copyright Act of 1976, copyright protection extends to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>34</sup> Works of authorship include literary works, musical works (and accompanying words), dramatic works (and accompanying music), pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures

---

<sup>25</sup> 1 Patry on Copyright § 1:23 (discussing the 1831 Act).

<sup>26</sup> *Id.*

<sup>27</sup> Copyright Act of 1909, Pub. L. 60-349, 35 Stat. 1075 (Mar. 4, 1909; *repealed* Jan. 1, 1978).

<sup>28</sup> 1 Patry on Copyright § 1:45 (detailing the 1909 Act).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> 17 U.S.C. § 107(b) (2007).

<sup>33</sup> 17 U.S.C. § 102 (1976).

<sup>34</sup> *Id.*

and other audiovisual works, and sound recordings.<sup>35</sup> Copyright holders are granted five exclusive rights: the right to reproduce their work, to create derivative works, to distribute copies by sale, lease, or rental, to perform the work publicly, and to display the work publicly.<sup>36</sup> Under this amendment, the fair use defense to copyright was codified for the first time.<sup>37</sup> Copyrighted works are permitted to be used for criticism, news reporting, teaching, scholarship, research purposes, and other purposes.<sup>38</sup> Very importantly, this Act increased the copyright term to the life of the author plus fifty years after the author's death.<sup>39</sup> Anonymous works, pseudonymous works, and works made for hire enjoy seventy-five years of protection.<sup>40</sup> For works published before 1978 that had not entered the public domain already, seventy-five years of protection was also granted.<sup>41</sup> Also, the requirements of registration, deposit, and renewing to maintain copyright were abolished.<sup>42</sup> This version of the Act prevails today, with some changes made to it by the Digital Millennium Copyright Act and the Copyright Term Extension Act.<sup>43</sup>

In 1998, Congress extended the duration of copyright protection by twenty years.<sup>44</sup> Therefore, most copyrights now last from creation until seventy years after the author's death.<sup>45</sup> Works created between 1923 and 1978 enjoy ninety-five years of copyright protection.<sup>46</sup> The extended term applies to existing and future copyrights.<sup>47</sup> This current copyright term extension

---

<sup>35</sup> *Id.*

<sup>36</sup> 17 U.S.C. § 106.

<sup>37</sup> 17 U.S.C. § 107.

<sup>38</sup> *Id.*

<sup>39</sup> 17 U.S.C. § 302.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Craig Joyce et al., *Copyright Law* (6<sup>th</sup> ed. 2003), 22-27.

<sup>43</sup> *Eldred*, 537 U.S. at 186.

<sup>44</sup> 17 U.S.C. § 302(a).

<sup>45</sup> *Id.*

<sup>46</sup> 17 U.S.C. §§302-304 (2011).

<sup>47</sup> *Id.* at 770-771.

therefore is set to expire in 2018, when Congress will be faced with the same decision again of whether to extend copyright terms further.<sup>48</sup>

### III. DISNEY'S INVOLVEMENT IN THE COPYRIGHT TERM EXTENSION DEBATE

Historically, the Disney Corporation has been extremely protective of their copyrights and has been a prominent proponent of copyright term extension. The company has gone so far previously as to sue three Florida day care centers that each featured a painting of Mickey Mouse as part of their indoor décor.<sup>49</sup> Disney also threatened to sue when the 1989 Oscar awards featured a parody of Snow White movie in the opening number of the broadcast.<sup>50</sup> Therefore, it was not surprising when Disney was heavily involved in the fight for copyright term extension in the late 1990s.

Disney became involved in the term extension battle because the company faced the possibility of losing protection for an integral part of their intellectual property, their Mickey Mouse character. Mickey Mouse was created by Walt Disney in 1928, and appeared in three feature films that year.<sup>51</sup> Mickey Mouse has served as the ultimate symbol of Disney, and by the time copyright term extension was debated in 1998, the copyright on Mickey Mouse earned about \$8 billion per year between Disney's consumer products and theme parks.<sup>52</sup> With the whopping revenue that Mickey Mouse brings in for Disney annually, Disney was naturally strongly invested in the extension of copyright terms.

Disney took major steps to lobby for copyright term extension in 1998. Michael Eisner, the chairman of Disney in 1998, personally met with Trent Lott, the Senate Majority Leader at

---

<sup>48</sup> Richter, *supra* note 3, at 451.

<sup>49</sup> Jessica Litman, *Mickey Mouse Emeritus: Character Protection and the Public Domain*, 11 U. MIAMI ENT. & SPORTS L. REV. 429 (Spring 1994).

<sup>50</sup> *Id.* at 435.

<sup>51</sup> Douglas A. Hedenkamp, *Free Mickey Mouse: Copyright Notice, Derivative Works, and the Copyright Act of 1909*, 2 VA. SPORTS & ENT. L.J. 254, 255 (Spring 2003).

<sup>52</sup> Marvin Ammori, *The Uneasy Case for Copyright Extension*, 16 HARV. J.L. & TECH. 287, 292 (2002).

that time to discuss the situation.<sup>53</sup> Disney created a Disney Political Action Committee that heavily donated to the senator's campaign chests.<sup>54</sup> After Lott became a co-sponsor of CTEA, Disney donated to his campaign, and contributed to eighteen of the bill's sponsors in both Houses.<sup>55</sup> It is estimated that Disney contributed more than \$800,000 to the reelection campaigns of these sponsors of CTEA.<sup>56</sup> Disney's major moves towards copyright extension were successful, as CTEA was signed into law.

#### IV. THE 1998 SONNY BONO COPYRIGHT TERM EXTENSION ACT

On October 27, 1998, President Bill Clinton signed the Sonny Bono Copyright Term Extension Act of 1998 into law.<sup>57</sup> Due to CTEA, no published copyrighted work will enter the public domain until January 1, 2019.<sup>58</sup> CTEA brought numerous changes to the copyright law in existence at the time of CTEA's passage. Under the CTEA, works created after January 1, 1978 receive copyright protection for the life of the author plus seventy years.<sup>59</sup> For anonymous works, pseudonymous works and "works made for hire," ninety-five years of protection would be enjoyed from first publication, or one hundred and twenty years of protection from creation.<sup>60</sup> For works that were already in their renewal term at the time the Act became effective, copyright protection was altered to include ninety-five years of protection from the date the copyright was originally secured.<sup>61</sup>

---

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Lindsay Warren Bowen, Jr., *Givings and the Next Copyright Deferment*, 77 *FORDHAM L. REV.* 809, 824 (2008).

<sup>57</sup> *Sonny Bono Copyright Term Extension Act*, 30 *U. MEM. L. REV.* 363, 364 (2000).

<sup>58</sup> *Id.*

<sup>59</sup> 17 *U.S.C.* §302(a) (2003).

<sup>60</sup> Patrick H. Haggerty, *The Constitutionality of the Sonny Bono Copyright Term Extension Act of 1998*, 70 *U. CIN. REV.* 651, 659 (2002).

<sup>61</sup> *Id.*

Proponents for CTEA argued that a longer copyright term creates a greater incentive for authors to create more works.<sup>62</sup> Since granting an author a limited monopoly creates incentive for authors to produce works, extending that monopoly would further incentivize creativity and the production of original works.<sup>63</sup> Making the process more appealing and rewarding for authors can only help stimulate new, original works, which undoubtedly benefits the public who gets the opportunity to enjoy and experience these works.

Further, proponents of the CTEA purport that copyright terms should be long enough to not only benefit the author, but for future heirs of the author.<sup>64</sup> With modern times has come expanded life expectancies and expanded commercial longevity of works.<sup>65</sup> Advocates have purported that terms should be long enough to protect the author and two succeeding generations of heirs. The lobbying efforts of companies like Disney paid off, as the Act was enacted.

#### V. THE SUPREME COURT DECISION OF ELDRÉD V. ASHCROFT

Eric Eldred, a retired programmer and founder of an online press, served as the plaintiff for the constitutional challenge to the CTEA.<sup>66</sup> Eldred's "Eldritch Press" was an international electronic library that made public domain books available on the internet for anyone to enjoy.<sup>67</sup> Over 20,000 people worldwide would log on to the website daily to read the works he made available.<sup>68</sup> After passage of the CTEA, Eldred's plans to expand the library came to a halt, as no new public domain material would be available until 2019.<sup>69</sup> Professor Lawrence Lessig of Harvard University learned of Eldred, and thought he would be a good choice for the plaintiff in

---

<sup>62</sup> Adeyanju, *supra* note 4, citing Orrin Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. PITT. L. REV. 719, 733-34 (1998).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Marvin Ammori, *The Uneasy Case for Copyright Extension*, 16 HARV. J.L. & TECH. 287, 293 (2002).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

a case challenging the law.<sup>70</sup> Eldred agreed to be a part of the suit, and joined Lessig’s effort to change the law.<sup>71</sup>

Eldred and nine other co-plaintiffs, each with services involving works from the public domain, challenged the CTEA as unconstitutional under the Copyright Clause’s “limited times” specification and the free speech guarantee of the First Amendment.<sup>72</sup> The petitioners argued that “limited time” in effect when a copyright begins is “the constitutional boundary, a clear line beyond the power of Congress to extend.”<sup>73</sup> Petitioners also argued that the CTEA is a “content-neutral regulation of speech that fails inspection under the heightened judicial scrutiny” for such regulations.<sup>74</sup> These constitutional challenges to the CTEA proved to be unsuccessful in the three lower courts, and ultimately the Supreme Court of the United States.<sup>75</sup>

The case went through the trial court, the District of Columbia Circuit court, the Court of Appeals, and the Supreme Court.<sup>76</sup> The trial court held that the “limited times” constitutional limit is not violated because while the CTEA extended copyright terms from the limits of the 1976 Act, the terms are still limited, rather than perpetual, and “therefore fit within Congress’ discretion.”<sup>77</sup> Also, the court held that “there are no First Amendment rights to use the copyrighted works of others.”<sup>78</sup> The circuit court affirmed, as did the appellate court, emphasizing that nowhere in the constitutional text does it suggest that a copyright term is not

---

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Eldred*, 537 U.S. at 186.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 186-187.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 186.

<sup>78</sup> *Id.*

for a limited time if it may later be extended for another limited time.<sup>79</sup> After the lower courts agreed, the Supreme Court heard the case in 2003, affirming the decision.<sup>80</sup>

The Eldred majority emphasized the Court's previous decisions of *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.* and *Graham v. John Deer Co. of Kansas City* that held Congress can implement the "stated purposes of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim."<sup>81</sup> The Court gave great deference to Congress, emphasizing that "the wisdom of Congress' action ... is not within our province to second-guess."<sup>82</sup> The Court seemed to move towards favoring rewarding the copyright owner, and away from their past belief of primarily promoting the public good, and providing public access to works.<sup>83</sup> Further acknowledging Congress' broad powers in regards to copyright, the Court held that Congress has a "virtually unlimited power to restrict the flow of new material into the public domain."<sup>84</sup> Therefore, it was clear that the Court gave strong deference to Congress and that expanding copyright terms are acceptable, so long as the term does not become perpetual.

However, the Court was unanimous in its belief that CTEA was an acceptable, constitutional law.<sup>85</sup> Justice Stevens dissented; stressing that focusing on the compensation of authors frustrates the members of the public who wish to make use of a work in the free market.<sup>86</sup> Furthermore, he felt that once a work is created, the need to encourage creation is

---

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at Footnote 3 (citing *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 6 (1966); *Bonito Boats v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 168 (1989)).

<sup>82</sup> *Id.* at 222.

<sup>83</sup> David E. Shipley, *Congressional Authority over Intellectual Property Policy After Eldred v. Ashcroft: Deference, Empty Limitations, and Risks to the Public Domain*, 70 ALB. L. REV. 1255, 1265 (2007) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (explaining that copyright law makes compensation to the author a secondary consideration); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (focused on the idea that copyright law serves the public good rather than the copyright owner).

<sup>84</sup> *Id.* at 1266, citing Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215, 255-56 (2002).

<sup>85</sup> *Eldred*, 537 U.S. at 241-244 (Dissenting opinions of Justice Stevens and Justice Breyer).

<sup>86</sup> *Id.* at 226.

diminished.<sup>87</sup> Stevens also believed that retroactive application of the CTEA would keep innumerable works out of the public domain, and that preventing the public domain from growing does not further the intent of the Copyright Clause.<sup>88</sup> He believed that the majority had gone too far, that the Court had essentially stated that Congress's actions under the Copyright Clause are judicially unreviewable.<sup>89</sup> Justice Breyer also dissented, believing that the original grant of a monopoly adequately incentivizes authors to create new work.<sup>90</sup> Breyer felt that extending the term of most copyrights to ninety-five years and many new copyrights to seventy years after the author's death was essentially a perpetual grant of copyright, and therefore unconstitutional.<sup>91</sup> He strongly felt that although Congress has broad power in regards to copyright, there are limits to that power, and that the CTEA over-stepped that boundary.<sup>92</sup> Therefore, despite the CTEA passing constitutional muster, not all of the justices appreciated the sweeping deference granted to Congress.<sup>93</sup>

The outcome in *Eldred* gives hope that future fights for the expansion of copyright protection will be successful. The Court bowed to Congress, permitting them to create copyright legislation as they saw fit, permitting that legislation is within constitutional boundaries. *Eldred* suggests that future term expansion, as long as the expansion is not perpetual, could be constitutional.

## VI. THE ARGUMENTS FOR AND AGAINST COPYRIGHT EXTENSION

Many reasons have been put forth by experts, Congress, the courts, and copyright owners as to why copyright protection should be expanded or limited. As 2018 draws closer, these

---

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 240-241.

<sup>89</sup> *Id.* at 241.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 242-243.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 241-244.

arguments will undoubtedly be put forth again, as Congress will be faced with the decision of whether or not to extend copyright protection again. Both sides of the argument have ample reasons as to why expanding or limiting copyright protection furthers the goals of copyright law, but the benefits of expanding protection outweighs any fear of limiting public access, and will incentivize authors to create new works for years.

The purpose of copyright law is "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>94</sup> The preamble of this section, "to promote the Progress of Science and useful Arts" illustrates that copyright law is more focused towards benefiting the public good, rather than compensating authors.<sup>95</sup> The second part of the section, "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," illustrates that while copyright law permits the grant of a monopoly to the author or inventor, it is to be for a limited time.<sup>96</sup> By permitting a limited monopoly, the Framers could ensure that the public would benefit from works entering the public domain after the author's "limited" exclusive ownership ceased.<sup>97</sup> This language illustrates that creators are to be rewarded for a limited time, and the public is then to benefit from works entering the public domain – a benefit for both parties involved.<sup>98</sup>

In 17 U.S.C. §106, Congress outlined the exclusive rights that copyright owners are granted.<sup>99</sup> Among other rights, copyright owners are permitted to reproduce their work, prepare

---

<sup>94</sup> U.S.C.A. Const. Art. I § 8, cl. 8.

<sup>95</sup> *Id.*, Adeyanju, *supra* note 4 (explaining the intention of the Framers' in creating the Copyright Clause).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> 17 U.S.C. §106.

derivative works based upon their copyrighted works, and distribute their copyrighted works.<sup>100</sup>

These rights ensure that the creator can exclusively reproduce their work, build off their creation, and distribute their work in the way they choose. The rights granted to copyright owners further the progress of science and the useful arts, as the Framers intended.<sup>101</sup>

The goals of copyright law can be attained while still expanding copyright protection. As times change, the law needs to change accordingly, as has been evidenced by the amendments to the Copyright Act throughout the years.<sup>102</sup> Proponents of extension argue that expanding protection will further incentivize the creation of works, that works will be grossly underused if they fall into the public domain, that other works will be overused and exploited upon entering the public domain, and that the hard work of copyright owners can be tarnished when their work enters the public domain.<sup>103</sup> Proponents also claim that as times change and the life expectancy of people increase and the longevity of businesses grows as well, that copyright terms need to be extended.<sup>104</sup> Proponents of CTEA believed that protection should benefit the author, and at least two future generations of the author's heirs.<sup>105</sup> These arguments present valid reasons as to why copyright terms should be expanded and the expansion of copyright terms for another, longer limited time, will not violate the constitution.

The most important argument for copyright extension is that in order to continue to incentivize creation, authors need to be incentivized adequately. Longer copyright terms mean

---

<sup>100</sup> *Id.*, Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 794 (explaining the main purposes of copyright law).

<sup>101</sup> 17 U.S.C. §106.

<sup>102</sup> See Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790 Act), Act of Feb. 1831, ch. 16, 4 Stat. 436 (repealed 1870), Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (repealed 1976), Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541. (Amendments to the Copyright Act).

<sup>103</sup> Christopher Buccafusco and 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, 12-17 (Spring 2013) (putting forth numerous hypotheses for copyright extension).

<sup>104</sup> Gifford, *supra* note 6, at 394-397.

<sup>105</sup> *Id.* at 389.

that the author, and his business or heirs, will exclusively enjoy the rewards of his work for a longer time, thus creating more of an incentive for him to create.<sup>106</sup> Since life expectancies are increasing as time goes on, some argue that copyright should be extended, since the children and grandchildren of authors will outlive the current terms, and they deserve to reap the benefits of those who came before them, authors who want their descendants to benefit from their hard work.<sup>107</sup> Besides people living longer, technological advances have naturally extended the commercial longevity of works.<sup>108</sup> Companies can now grow into huge conglomerates that withstand the test of time for generations. These changes over time mean that works can be exploited longer, and that they should be.<sup>109</sup> Expanding copyright terms will therefore further incentivize creation, as authors will be reassured that their work will remain protected for a longer time.

The potential for works to be underused is also a concern for extension proponents.<sup>110</sup> If current copyright owners know that their exclusive right to their work is limited, this can “lead to inefficiencies because of impaired incentives to invest in maintaining and exploiting these works.”<sup>111</sup> The creation of copyrighted works is often expensive.<sup>112</sup> The maintenance or continued production of works can also be extremely costly.<sup>113</sup> If terms are not long enough, creators cannot confidently know that they will be able to exclude others from copying their ideas, and therefore will refrain from creating in the fear that their investment will not be

---

<sup>106</sup> Buccafusco and Heald, *supra* note 103, at 3.

<sup>107</sup> Adeyanju, *supra* note 4.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Buccafusco and Heald, *supra* note 7, at 13.

<sup>111</sup> *Id.*, citing William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 475 (2003) (arguing for indefinitely renewable copyright based on five-year renewable terms).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 14.

recovered.<sup>114</sup> That undoubtedly suppresses creativity in some capacity, therefore harming the public. Copyright owners are granted the exclusive right to create derivative works from their creations.<sup>115</sup> However, if terms are not extended, creators will not necessarily be incentivized to create subsequent derivative works based on their creation.<sup>116</sup> While companies with long-term copyrights, such as Disney, have already recouped their investments long ago, they are still continuously investing in works featuring that copyright, and taking a copyright away prematurely therefore stifles creativity. Just because a company has profited “enough” from a copyright is not grounds for releasing it to the public domain. The potential for the underuse of current copyrights directly undermines the goal of progress, and is a rightful concern for expansion proponents.

When copyrights fall into the public domain, especially while they are still in active use, the gross overuse of the copyright is a realistic danger.<sup>117</sup> Assuming that the value of creative works is finite, when a work falls into the public domain, “others will rush to exploit the work’s value immediately,” which is not always in the best interest of the public.<sup>118</sup> Copyright owners should have the opportunity to exploit their own creations to the extent they chose to before the copyright is automatically seized by the public domain.<sup>119</sup> If authors know that they are creating works for the benefit of the public domain rather than for the gain of their heirs, they could be disenchanted from putting in the time and effort to create. By allowing works to fall into the public domain too soon, the work might not have hit its maximum value yet, despite being in

---

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 15.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

existence for a number of years, and the danger of overuse of copyrights by others is very real, and copyright owners stand to lose the benefits from the works they created.<sup>120</sup>

Similar to the idea of others overusing copyrights and making them lose value, is the idea that by allowing copyrighted works to enter the public domain, the copyright can easily become tarnished.<sup>121</sup> Others are free to use the copyright, and can misuse and distort the copyright to their liking, very possibly tarnishing the original creation.<sup>122</sup> This can reduce the value of the copyright, and ultimately harm social welfare.<sup>123</sup> While some works created by others after a copyright enters the public domain will undoubtedly benefit society, the idea of taking a copyright that is in current use and tossing it into the public domain seems wrong. Copyright law seeks to incentivize derivative works by the author who created the work, not by allowing others to have their way with a work in the public domain, ultimately tarnishing the original copyright.<sup>124</sup> If consumers see a poor derivative work or an inappropriate use of a copyright, they potentially will be turned off from the original work, which harms the original author and can harm the public.<sup>125</sup>

However, the opponents of extension have their own ample arguments. Opponents believe that terms do not need to be extended any further in the interest of incentivizing new or derivative works, and that it is not reasonable to think that a twenty year increase in copyright terms for works that have already been created can incentivize new work.<sup>126</sup> Also, opponents to term extension argue that the increase in life expectancy argument of proponents is inadequate,

---

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 17.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Adeyanju, *supra* note 4, citing Patrick H. Haggerty, *The Constitutionality of the Sonny Bono Copyright Term Extension Act of 1998*, 70 U. CIN. L. REV. 651, 663 (2002).

as current terms provide for a number of protected years after the death of the author, so the author benefits from exclusive use for the duration of his lifetime.<sup>127</sup>

Opponents argue that the idea of protecting the work during the author's lifetime, and the lifetime of two generations after him is not an intention of copyright law.<sup>128</sup> This intent to grant protection to the author's heirs has never been expressly stated as a goal.<sup>129</sup> While the desire of a creator to pass on the fruit of his labors is reasonable, it is too far to support a system that seeks to benefit descendants that the author did not even know.<sup>130</sup> Also, the general public will be better off if the heirs of these hypothetical authors did something productive.<sup>131</sup>

Along the same lines of not wanting to protect the rights of future descendants, opponents disagree that terms should be extended as life expectancies are increasing.<sup>132</sup> Opponents argue that since the current term framework provides for protection for seventy years after the author's death, so the work will still be protected for a number of years.<sup>133</sup> As life expectancies are increasing, the author will potentially live longer, and thus the term is automatically extended for that many more years.<sup>134</sup> Opponents feel that since there is no right for two generations to benefit from copyright protection, that increased life expectancy is also not a legitimate reason to extend copyright protection.<sup>135</sup>

While proponents of copyright acknowledge that companies are surviving longer and that technological advances have made works commercially viable for longer periods, opponents

---

<sup>127</sup> Gifford, *supra* note 6, at 396.

<sup>128</sup> *Id.* at 394.

<sup>129</sup> *Id.*

<sup>130</sup> *Copyright Term Extension Act: Hearings on H.R. 989 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, supra* note 181 (explaining viewpoint of Dennis S. Karjala, Professor of Law, Arizona State University about the negative aspects of granting protection to future generations).

<sup>131</sup> Gifford, *supra* note 6, at 395.

<sup>132</sup> *Id.*

<sup>133</sup> The Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.).

<sup>134</sup> Gifford, *supra* note 6, at 395.

<sup>135</sup> *Id.*

claim that copyright protection is a “bargained agreement between the government and the creators. Copyright protection is not an inherent right, but a statutory creation of the government.”<sup>136</sup> Opponents argue that authors know that their work will eventually fall into the public domain, and that this is a social bargain that exists in our society.<sup>137</sup>

Opponents also believe that extension is a potential violation of the public trust doctrine.<sup>138</sup> Since the public benefits from works entering the public domain, freezing the public domain for a certain number of years can constitute a wrongful taking of works that were going to enter the public domain and benefit the public.<sup>139</sup> Opponents believe that this doctrine can be applied to copyright law and that freezing the public domain is a direct violation of the public trust doctrine.<sup>140</sup>

Decreasing the number of works available for use in the public domain comes with its own dangers, according to opponents of extension. If works are kept out of the public domain, authors have less material to build upon.<sup>141</sup> Also, some companies and creators suffer, since they have less to choose from that they can use from the public domain, therefore stifling creativity.<sup>142</sup> After the passage of CTEA, the public domain remains frozen until 2018, with no new works entering it.<sup>143</sup>

---

<sup>136</sup> *Id.*, citing Marci A. Hamilton, *Art and the Marketplace of Expression*, CARDOZO ARTS & ENT. L.J. 167, 169 (1999).

<sup>137</sup> *Id.* at 396.

<sup>138</sup> *Id.* citing Berkman Center for Internet and Society, *A Brief Statement of the Relevance of the Public Trust Doctrine to the CTEA* (last modified Apr. 11, 1999) <<http://cyber.law.harvard.edu/eldredvreno/pubtrst2.html>> (citing *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892)).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 397-398.

<sup>142</sup> *Id.*

<sup>143</sup> The Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.).

Opponents also are suspicious of the idea that extended terms will necessarily incentivize authors to create new works.<sup>144</sup> Their view is that it is unlikely that an author would be incentivized to create a copyrightable work merely because twenty or so years of additional protection is provided.<sup>145</sup> Opponents staunchly believe that if the benefit of incentivizing authors does exist by extending terms, that benefit is easily outweighed by the harm to the public, especially with fewer additions to the public domain.<sup>146</sup>

Besides the aforementioned arguments, opponents staunchly believe that copyright term extension is at the point where it has become unconstitutional.<sup>147</sup> The plaintiffs argued this in *Eldred*, without success.<sup>148</sup> Since the constitution grants a copyright owner a temporary monopoly, opponents believe that by continuously increasing terms, Congress is permitting a perpetual copyright term, which is unconstitutional.<sup>149</sup> Opponents also argue that extension is unconstitutional under the First Amendment.<sup>150</sup> If the public domain is not growing, opponents argue that this is a limit on free speech, as those authors cannot use the works that potentially would be entering the public domain.<sup>151</sup>

In balancing the arguments of both the proponents and the opponents of extension, it is evident that the benefits of extension outweigh the potential pitfalls – and adhere to the basic goals of copyright law. As times change, so must our laws, and with longer life expectancies and commercial viability of works comes the need for longer terms to continue incentivizing

---

<sup>144</sup> Gifford, *supra* note 6, at 400.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Eldred*, 537 U.S. at 186 (plaintiffs argued that the CTEA was unconstitutional as a violation of the “limited times” phrase of the Copyright Clause).

<sup>148</sup> *Id.*

<sup>149</sup> Joseph D. Mirarchi, *The Big Effect of Two Little Words: Why A "Limited Times" Challenge Will Stop the Next Copyright Term Extension*, 43 RUTGERS L.J. 131, 132 (2012) (explaining that continuous extensions are attempts by Congress to make copyright “effectively perpetual”).

<sup>150</sup> *Eldred*, 537 U.S. at 186 (plaintiffs argued that CTEA was unconstitutional as a violation of the First Amendment).

<sup>151</sup> *Id.*

creation. In order to promote the all-important progress of science and the useful arts, authors and companies need to be adequately incentivized to create, expanding terms for longer, but limited, times.

Studies have proven that extension has previously increased the amount of new copyrights, thus incentivizing creation. In 2003, a study proved that the last two major copyright changes before CTEA, the Copyright Act of 1976 and the 1988 Berne Convention, had significant effects on copyright registrations.<sup>152</sup> The Berne Convention, a treaty that provided some international protection from copyrights, was associated with approximately a ten percent increase in registrations.<sup>153</sup> Also, the overall increase in copyright registrations after the 1976 Copyright Act, which extended protection to the life of the author plus fifty years, was about sixteen percent.<sup>154</sup> While the conclusion that therefore these extension of copyright terms increased creativity has been refuted, it seems that any increase in copyrights can be considered an increase in creativity and beneficial to the public, making more works available. Apparently, there is only a “thirty-eight percent chance that a law increasing copyright protection will lead to an increase in the number of new registrations for a single, unknown category of copyrighted work.”<sup>155</sup> However, any chance of an increase in copyrights would benefit the public. It seems reasonable to predict that the further expansion of terms would increase registration again – which supports the goal of copyright law to further the progress of the sciences and the useful arts.<sup>156</sup>

---

<sup>152</sup> William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law 2010* (2003) (explaining the change in copyright registration after previous major changes to copyright law); Debora Halbert, *Intellectual Property in the Year 2025*, 49 J. COPYRIGHT SOC'Y U.S.A. 225 (2001) (describing the 1988 Berne Convention).

<sup>153</sup> Landes & Posner, *supra* note 164, at 247.

<sup>154</sup> *Id.*; 17 U.S.C. § 102 (1976).

<sup>155</sup> Ku, Sun & Fan, *supra* note 161, at 1686-87,

<sup>156</sup> *Eldred*, 123 S.Ct.at 128 (stating the goals of copyright law).

Other studies have shown that changes in copyright law have beneficially affected the public's valuation of firms that relied on copyright law.<sup>157</sup> In a study measuring how changes in copyright protection changed the market value of firm equity from 1985 to 1998, it was determined that statutory changes and court decisions had a significant impact on equity returns.<sup>158</sup> Furthermore, the study showed that the “legal changes broadening copyright protection were associated with increase in firm equity, while legal changes narrowing copyright protection were associated with decreases in firm equity.”<sup>159</sup> Therefore, changes in copyright law had an effect on the public's “valuation of firms that relied upon copyright law.”<sup>160</sup> This ultimately benefits the public, by keeping businesses alive, aiding the economy, and making more works available to the public.

As for opponents arguing that copyright term extension is unconstitutional, the Supreme Court has directly ruled otherwise.<sup>161</sup> In *Eldred*, the Supreme Court stated that, “[t]he CTEA reflects judgments of a kind [...] we cannot dismiss as outside the Legislature's domain.”<sup>162</sup> The Court held that Congress “rationally credited protections that longer terms would encourage copyright holders to invest in [...] their works” because of the incentives that copyright term extension would create.<sup>163</sup> Since it has already been determined that an extended, yet limited, copyright term is constitutional, Congress is confirmed to have the power to do so. Another extension would not indefinitely extend copyright terms – and that is the only reason that extension could be destroyed as unconstitutional. Therefore, a longer extension is in the power

---

<sup>157</sup> Matthew J. Baker & Brendan M. Cunningham, *Court Decisions and Equity Markets: Estimating the Value of Copyright Protection*, 49 J.L. & Econ. 567. (explaining how changes in copyright law impacts the market valuation of firms).

<sup>158</sup> *Id.* at 571-72.

<sup>159</sup> Ku, Sun & Fan, *supra* note 161, at 1686-87, citing *Id.* at 582-84.

<sup>160</sup> *Id.* at 1687.

<sup>161</sup> *Eldred*, 537 U.S. at 186.

<sup>162</sup> *Id.* at 188.

<sup>163</sup> *Id.*

of Congress to decide upon, and the Supreme Court has already held that it will give great deference to Congress in this arena.<sup>164</sup>

Yet another study, conducted in 2006, proved that countries that extended the terms of copyright from the author's life plus fifty years to the author's life plus seventy years anytime between 1991 and 2002, saw a significant increase in movie production.<sup>165</sup> This data proved that a relationship between copyright duration and the production of movies does exist, and that increasing copyright duration has a positive impact.<sup>166</sup> Increased movie production, or the increased production of anything copyrightable, furthers the goal of copyright, and these studies show that increased copyright protection is an incentive for creation.<sup>167</sup>

The fact that life expectancies and the commercial viability of works increases demonstrates a need for the expansion of copyright, for additional incentive to create. As life expectancy increases, an author's children and grandchildren can very easily live past the duration of copyright protection of the author's life plus seventy years.<sup>168</sup> Also, modern technology has increased the commercial viability of works. Companies are surviving longer, some becoming international conglomerates that have no foreseeable demise, and in order to incentivize these companies to keep creating, they need additional protection. If a company whose main copyrights have existed for a long time knows their work will soon fall into the public domain, they would likely be less incentivized to create derivative works or more new works utilizing that copyright. For example, Disney might begin rethinking their excessive branding utilizing Mickey Mouse if they stand to lose that copyright in 2018. They could

---

<sup>164</sup> *Id.* at 219.

<sup>165</sup> Ivan P.L. Png & Qiu-Hong Wang, *Copyright Duration and the Supply of Creative Work* (Sept. 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=932161](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=932161).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Adeyanju, *supra* note 4, citing Patrick H. Haggerty, *The Constitutionality of the Sonny Bono Copyright Term Extension Act of 1998*, 70 U. CIN. L. REV. 651, 661 (2002).

potentially start utilizing some of their other characters more prominently and stop making new works featuring Mickey Mouse. Bruce Lehman, the former Commissioner of Patents and Trademarks, explained to Congress, “There is ample evidence that shows that once a work falls into the public domain it is neither cheaper nor more widely available than most works protected by copyright.”<sup>169</sup> Lehman further explained that quality copies of public domain works are not widely available because publishers may not want to publish a work that is in the public domain, fearing that they will not recoup their investment.<sup>170</sup> Therefore, not only would the creator suffer from losing his copyright protection, but this sort of behavior harms the public, who does not get the benefit of these works. While current protection does supply security for a significant amount of time, an increase in protection would promote progress even more, and is more in line with the increase in life expectancy and the commercial viability of works.

The threat of underuse of copyrights supports extension, due to the belief that works become less available to consumers when they enter the public domain.<sup>171</sup> By not extending rights, some current copyright owners know that protection for their work is limited and they will be less inclined to invest the money, time, and effort into building upon their copyrights since they will not necessarily be able to recoup their investment costs.<sup>172</sup> This harms the public, as some works will therefore never be created. This also applies to works that have already been created.<sup>173</sup> Since some works require “costly investments to maintain, produce, and distribute,” if authors know they cannot recoup their investment, they will not bother to invest at all.<sup>174</sup> For example, while Disney has recouped their initial investment in creating the Mickey Mouse image

---

<sup>169</sup> Buccafusco and Heald, *supra* note 103, at 9.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 13.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

that is copyrighted, they perpetually utilize Mickey Mouse on products and in their theme parks, which is a continuous cost. If Mickey Mouse fell into the public domain, Disney might stop utilizing him, thinking they would not be able to recoup expenditures, and Mickey could become underused, not benefitting anyone. Allowing a work to fall into the public domain can therefore result in the underuse of works, which not only harms the original author, who could continue to profit from the work if it remained under copyright, but the public as well.

Besides the hazard of the general underuse of copyrights, comes the risk that copyrighted works will be underused in a way that limits derivative works.<sup>175</sup> Professor Arthur Miller explains “you have to provide incentives for [producers] to produce the derivatives, the motion picture, the TV series, the documentary, whatever it may be.”<sup>176</sup> This ultimately harms the public, by preventing progress as a result of derivative works the author could have created.

The tarnishment of copyrights not only affects copyright holders but the public. If a copyright enters the public domain and anyone can create a work with it, the public can either be misled into thinking the creation is the legitimate work of the author, and might consume goods that are not up to the quality level that they expected and the author’s reputation can be damaged. For example, the well-loved Christmas classic, “It’s a Wonderful Life” fell into the public domain in the 1980s.<sup>177</sup> Television networks played poor-quality versions of the film, and companies sold the film on VHS tapes, using whatever shoddy-condition version of the film that they could find.<sup>178</sup> Multiple versions of the film existed in “horrid condition,” and the film was

---

<sup>175</sup> *Id.* citing *Symposium, The Constitutionality of Copyright Term Extension: How Long is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 693 (2000) (panel comments of Arthur Miller).

<sup>176</sup> *Id.*

<sup>177</sup> Steven Mitchell Schiffman, *Movies in the Public Domain: A Threatened Species*, 20 COLUM.-VLA J.L. & ARTS 663, 664 (1996).

<sup>178</sup> Scott M. Martin, *The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Protection*, 36 LOY. L.A. L. REV. 253, 273 (2002) (explaining the process of “It’s a Wonderful Life” entering the public domain and being rescued).

often altered by local television stations that removed parts and made ample room for commercials.<sup>179</sup> Luckily, the film was removed from the public domain when a company successfully claimed that it still held the copyright.<sup>180</sup> The film was thereafter digitally restored and played and distributed in the way it should have been, arguably benefitting the public by being quality entertainment.<sup>181</sup> While copyright protection cannot last forever, it is reasonable that terms should be extended because works that are very much still in use deserve to be protected from tarnishment, for the sake of not only the authors, but the public as well.

In summary, while the public domain benefits the public by providing works for authors to build upon and public access to older works, it is also a problem for copyrights that are not ready to enter the public domain. If terms are extended for a limited time, works will all inevitably fall into the public domain – but after more time has passed, which better suits modern times. Exploited and poorly-produced copies can be made which damages the reputation of the original author, and importantly, misleads the public or presents them with lesser-quality works. With more years of protection, comes more years that authors know they and their descendants will benefit from their work, which provides the incentive to create, which undoubtedly always benefits the public.

## VII. HOW COPYRIGHT PROTECTION SHOULD BE EXTENDED IN 2018

As 2018 approaches, Congress will again need to start considering the arguments for and against term extensions. Congress should recognize that to further incentivize progress and to reward the creativity behind original works, copyright terms should be extended. The only limit

---

<sup>179</sup> *Id.*

<sup>180</sup> Henry S. Cohn, *Brand Name Bullies: The Quest to Own and Control Culture* by David Bollier John Wiley & Sons, Hoboken, NJ, 2005. 309 Pages, Fed. Law., September 2005, at 53, 54.

<sup>181</sup> Martin, *supra* note 181 at 273.

on copyright terms is that a term cannot be perpetual.<sup>182</sup> The Supreme Court has clearly given full deference to Congress' decisions in the past, and as terms have increased, they should continue to do so to accommodate copyrights.<sup>183</sup>

By additional term extensions, the intent of the Framers can be furthered, as those with the talent to create will be incentivized to continue crafting new and innovative works, furthering progress. By permitting copyright owners to leave their legacy to future generations and preventing the underuse of useful works by keeping them out of the public domain for longer periods of time, the future of the progress of the sciences and useful arts can be protected. By stopping works from entering the public domain too prematurely, where the overuse and exploitation of the copyright can diminish its value and steal the opportunity of the author to be compensated maximally, and where copyrights can be tarnished by others, authors will be incentivized to continue creating, benefiting themselves and the public at large.

If Congress is disenchanted with the idea of granting another twenty-year extension to copyright terms, and basically replicating CTEA, there are other avenues that Congress could explore. Since the upkeep of the public domain is a big concern to opponents of copyright term extension, perhaps the next term extension can make a compromise on how the public domain will be affected. If some formalities for copyright protection were reintroduced, for example, requiring copyright owners to apply for and renew their copyrights, works will fall into the public domain after a certain period of time. Economics scholars William Landes and Richard Posner agree with this position, offering evidence of low rates of renewal during past periods of

---

<sup>182</sup> Marvin Ammori, *The Uneasy Case for Copyright Extension*, 16 HARV. J.L. & TECH. 287, 299 (2002) (explaining the difference between perpetual copyright terms and the extension of copyright terms).

<sup>183</sup> *Eldred*, 537 U.S. (explaining the deference the Court gives to Congress in regards to copyright law).

copyright formalities.<sup>184</sup> Landes and Posner assert that less than eleven percent of the copyrights that were registered between 1883 and 1964 were renewed upon the end of their twenty-eight year term, despite the low cost of copyright renewal.<sup>185</sup> By limiting a copyright term extension with a way to maintain the growth of the public domain, Congress can potentially appease opponents somewhat, promote the public good, and continue to protect those who still wish to retain and use their copyrights.

Many successful companies today still make use of copyrights that have existed for extended periods of time and are still imperative to their business. As aforementioned, the last time copyright extension was considered, the value of Disney's copyright for Mickey Mouse was a whopping \$8 billion in 1998.<sup>186</sup> That number has grown, and the company continues to use Mickey on merchandise, marketing, video productions, and other products. If Disney was to lose Mickey Mouse in 2018 to the public domain, there would be free reign as to who could produce merchandise or products using Mickey Mouse. Inferior goods would inevitably be produced, and consumers might purchase them at a cheaper price, or might purchase them unknowingly, mistaking the goods to be authentically Disney. This can ultimately result in lost profits for Disney, and can easily tarnish the quality of entertainment and merchandise for which Disney is known. A company that is still putting money and work behind a copyright deserves the right to solely enjoy the benefits of their success.

In order to best further the goals of copyright law, Congress should extend copyright protection in 2018 once again, and require copyright owners to renew their copyrights, as aforementioned. A possible solution would be using the current framework, since our copyright

---

<sup>184</sup> William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 473-474 (2003).

<sup>185</sup> *Id.*

<sup>186</sup> Ammori, *supra* note 52, at 292.

laws align nicely with those in Europe, and add on additional terms during which copyrights can be renewed. Therefore, copyrights would start entering the public domain immediately, as some copyright owners inevitably would choose not to renew. A plan that permits authors to renew their copyright every five years, for six terms, copyright owners would be given an additional thirty years of protection. Since a decision of Congress in regards to copyright law must only pass rational basis review, an extension such as this would survive scrutiny by the court. Especially if renewable terms were added, thus allowing the public domain to grow every five years, rather than have it frozen for a block of years, such as it was as a result of CTEA.

## VII. CONCLUSION

In 2018, Congress will be faced with the question of extending terms again or maintaining the current law, allowing copyrights to infiltrate the public domain as of 2019.<sup>187</sup> Proponents of extension will argue that terms can be extended, so long as they are not perpetual and that longer terms further incentivizes progress. Opponents will argue that there is no right for a copyright to survive multiple generations, that extensions limit the public domain and the building upon of works, and that extending terms does not necessarily further incentivize authors. To best protect current copyrights, and incentivize further creation, Congress should expand copyright terms within the constitutional limits. By creating a system where formalities are used, and copyright owners have to renew their copyright, for a number of terms, copyright law would extend terms, while adding to the public domain, and staying within constitutional boundaries.

---

<sup>187</sup> Arlen W. Langvardt, *The Beat Should Not Go on: Resisting Early Calls for Further Extensions of Copyright Duration*, 112 PENN ST. L. REV. 783, 790 (2008).