
GUARDING AGAINST ABUSE: THE COSTS OF EXCESSIVELY LONG COPYRIGHT TERMS

By Derek Khanna*

I. INTRODUCTION

Copyrights are intended to encourage creative works through the mechanism of a statutorily created¹ limited property right, which some prominent think tanks and congressional organizations have referred to as a form of government regulation.² Under both economic³ and legal analysis,⁴ they are recog-

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¹ See Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. INTEL. PROP. L. 315, 383 (2000) ("Ever since *Wheaton v. Peters*, copyright in published works has been understood to be a creature of statute."); see also *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 28 (1979) ("A copyright, like a patent, is a statutory grant of monopoly privileges."); See *Wheaton v. Peters*, 33 U.S. 591, 660 (1834)

No such right at the common law had been recognized in England, when the colony of Penn was organized. Long afterwards, literary property became a subject of controversy, but the question was involved in great doubt and perplexity; and a little more than a century ago, it was decided by the highest judicial court in England, that the right of authors could not be asserted at common law, but under the statute.

Id.

² James Pethokoukis, *Regulatory & Financial Reforms to Combat Cronyism and Modernize Our Economy*, in ROOM TO GROW: CONSERVATIVE REFORMS FOR A LIMITED GOVERNMENT AND A THRIVING MIDDLE CLASS 81, 85 (YG Network ed., 1st ed. 2014), available at <http://ygnetwork.org/wp-content/uploads/2014/05/Room-To-Grow.pdf> ("[O]ver the years, copyright and patent law has evolved into cronyist protection of the revenue streams of powerful incumbent companies—a type of regulation that hampers innovation and entrepreneurship.").

³ Monopolies are the accurate economic term for the instrument of copyright. Brief for

nized as a form of government-granted monopoly.⁵ Economic efficiency and

George A. Akerlof et al. as Amici Curiae Supporting Petitioners at 3, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) (“In basic terms, copyright protection grants a monopoly over the distribution and sale of a work and certain new works based upon it. The copyright monopoly has several costs.”); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM: 40TH ANNIVERSARY EDITION* 127-28 (University of Chicago Press eds., 2002)

In both patents and copyright, there is clearly a strong prima facie case for establishing property rights. . . . At the same time, there are costs involved. . . . The specific conditions attached to patents and copyrights [such as term lengths] are matters of expediency to be determined by practical considerations. I am myself inclined to believe that a much shorter period of patent protection would be preferable.

Id.; FRIEDRICH A. HAYEK, *INDIVIDUALISM & ECONOMIC ORDER* 113-114, (1948)

The problem of the prevention of monopoly and the preservation of competition is raised much more acutely in certain other fields to which the concept of property has been extended only in recent times. . . . [the extension of property like rights to copyright has] done a great to foster the growth of monopoly and that here drastic reforms may be required.

Id. For an example of an economic analysis of optimal copyright term that uses “monopoly” as the accurate economic term, see RUFUS POLLOCK, *FOREVER MINUS A DAY? CALCULATING OPTIMAL COPYRIGHT TERM 2* (Univ. of Cambridge ed., 2009), available at http://rufuspollock.org/papers/optimal_term.pdf (“Extending term on these works prolongs the copyright monopoly and therefore reduces welfare by hindering access to, and reuse of, these works.”); Robert M. Hurt, *The Economic Rationale of Copyright*, 56 *THE AM. ECON. REV.* 421, 421–32 (1966), available at JSTOR.

⁴ See generally MELVILLE B. NIMMER, *A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY AND THE PROTECTION OF IDEAS* (M. Bender ed., 1965) (on Copyright, 10-volume work that is the most cited work in the field and considered to be the leading treatise on copyright law referring to copyright as a “limited monopoly”); See also WILLIAM PATRY, *HOW TO FIX COPYRIGHT* (2011) (another more recent treatise on copyright law, referring to copyright as a “monopoly”); A WestLaw search of “copyright” and “monopoly” retrieved 67 Supreme Court cases and 2,497 cases total. Since Westlaw is incomplete, the number of potential cases could be higher, however not all retrievals are instances of copyright being referred to as a “monopoly.” But a check of a number of them demonstrates that most of them are. For major Supreme Court cases using term “monopoly” see, for example, *Eldred v. Ashcroft*, 537 U.S. 186, 260 (2003) (Breyer, J., dissenting) (mentioning “the anti-monopoly environment in which the Framers wrote the Clause,” which suggests the way the Framers understood “the basic purpose of the Copyright Clause”); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 28 (1979) (Stevens, J. dissenting) (“A copyright, like a patent, is a statutory grant of monopoly privileges.”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (Douglas, J., concurring) (“[M]ay statuettes be granted the monopoly of the copyright?”).

⁵ The Supreme Court has long recognized that copyrights are government granted monopolies. See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) (“We have often recognized the monopoly privileges that Congress has authorized, while ‘intended to motivate the creative activity of authors and inventors by the provision of a special reward,’ are limited in nature and must ultimately serve the public good.”); see also *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 546 (1985) (quoting *Sony Corp. v. Universal City Studios*, 464 U.S. 539, 477 (1984)) (“The monopoly created by copyright thus rewards the individual author in order to benefit the public.”); see also *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 429 (1984) (“Congress . . . has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or inventors in order to give the public appropriate access to their work product.”); See also *Twentieth Century v. Aiken*, 422 U.S. 151,

constitutional law both suggest copyrights should solve potential market failures, in order to “promote the progress of the sciences.”⁶ In examining the specific term lengths for copyright and patent, Milton Friedman deemed the subject a matter of “expediency” to be determined by “practical considerations.”⁷ Friedrich Hayek distinguished copyright from traditional property rights, identified a number of problems with modern copyright, specifically condemning the “slavish application of the concept of property,” and called for “drastic reforms.”⁸ Adam Smith, referred to copyright as a “temporary monopoly” provided by government, and compared copyrights and patents as similar to government providing a monopoly on trade, granted for merchants who explore “remote and barbarous nations” because these monopolies are “the easiest and most natural way in which the state can recompense them ... of which the public is afterwards to reap the benefit.”⁹ The conservative movement, which

156 (1975) (“The limited scope of the copyright holder’s statutory monopoly ... reflects a balance of competing claims upon the public interest”); *see also* Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”).

⁶ U.S. CONST. art. I, § 8, cl. 8.; Derek Khanna, *R Street Policy Study No. 20: Guarding Against Abuse: Restoring Constitutional Copyright*, R STREET 1 (Apr. 2014), <http://www.rstreet.org/wp-content/uploads/2014/04/RSTREET20.pdf>.

⁷ *See* FRIEDMAN, *supra* note 3, at 127-28

These are very superficial comments on a difficult and important problem. Their aim is not to suggest any specific answer but only to show why patents and copyrights are in a different class from the other governmentally supported monopolies and to illustrate the problem of social policy that they raise. One thing is clear. The specific conditions attached to patents and copyrights for example, the grant of patent protection for seventeen years rather than some other period are not a matter of principle. They are matters of expediency to be determined by practical considerations. I am myself inclined to believe that a much shorter period of patent protection would be preferable.

Id.

⁸ *See* HAYEK, *supra* note 3, at 113-114

The problem of prevention of monopoly and the preservation of competition is raised much more acutely in certain other field to which the concept of property has been extended only in recent times. I am thinking here of the extension of the concept of property to such rights and privileges as patents for inventions, copyright, trade-marks, and the like. It seems to me beyond doubt that in these fields a slavish application of the concept of property as it has been developed for material things has done a great deal to foster the growth of monopoly and that here drastic reforms may be required if competition is to be made to work.

Id.

⁹ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 617 (1776), *available at* <http://www2.hn.psu.edu/faculty/jmanis/adam-smith/wealth-nations.pdf>

When a company of merchants undertake, at their own risk and expense, to establish a new trade with some remote and barbarous nation, it may not be unreasonable to incorporate them into a joint stock company, and to grant them, in case of their success, a monopoly of the trade for a certain number of years. It is the easiest and most natural

largely has supported originalist methods of interpreting the Constitution, traditionally has been in favor of copyright reform, with proposals usually including shorter copyright terms.¹⁰

way in which the state can recompense them for hazarding a dangerous and expensive experiment, of which the public is afterwards to reap the benefit. A temporary monopoly of this kind may be vindicated upon the same principles upon which a like monopoly of a new machine is granted to its inventor, and that of a new book to its author. But upon the expiration of the term, the monopoly ought certainly to determine; the forts and garrisons, if it was found necessary to establish any, to be taken into the hands of government, their value to be paid to the company, and the trade to be laid open to all the subjects of the state. By a perpetual monopoly, all the other subjects of the state are taxed very absurdly in two different ways: first, by the high price of goods, which, in the case of a free trade, they could buy much cheaper; and, secondly, by their total exclusion from a branch of business which it might be both convenient and profitable for many of them to carry on.

Id.

¹⁰ See Steve Forbes, *Fact and Comment*, FORBES (Mar. 31, 2003, 12:00 AM), www.forbes.com/forbes/2003/0331/027.html

The extension was pushed primarily by Disney, which didn't want any of its old Mickey Mouse cartoons entering the public domain. . . . Maybe Congress should just be done with it and declare that a copyright is forever. . . . Stanford Law School Professor Lawrence Lessig has proposed a sensible compromise. Borrowing a page from patent law, wherein holders have to pay a fee every few years to keep their patents current, Lessig would apply that principle to copyrights: After a certain number of years, copyright holders would have to pay a nominal amount of money to maintain protection. If the holder didn't pay the charge for, say, three years, the work would go into the public domain.

Id.; Phyllis Schlafly, *Why is Congress Criminalizing Copyright Law?*, EAGLE FORUM (June 24, 1998), <http://www.eagleforum.org/column/1998/june98/98-06-24.html> (“Congress seems intent on changing all our intellectual property laws to benefit big corporations.”); Phyllis Schlafly, *Why Disney Has Clout with the Republican Congress*, EAGLE FORUM (Nov. 25, 1998), www.eagleforum.org/column/1998/nov98/98-11-25.html

‘Limited time’ is not only a constitutional requirement, it is an excellent rule. There is no good reason for the remote descendants of James Madison, Julia Ward Howe, or Thomas Nast to receive royalties on the Federalist Papers, the Battle Hymn of the Republic, or Santa Claus. . . . [W]hy did Judiciary Committee Republicans quietly put through legislation that hurts the public interest but is so immensely profitable to Disney?

Id.; Phyllis Schlafly, *Copyright Extremists Should Not Control Information*, TOWNHALL.COM (Dec. 31, 2002), www.eagleforum.org/column/2003/jan03/03-01-01.shtml

Copyright extremists are committing all this mischief under current law. Yet, the music labels and Hollywood argue that current laws are not strong enough, and they are lobbying for an assortment of new anti-consumer legislation. . . . We should not permit copyright extremists to exploit current laws for that goal, and we should reject their demands that Congress give them even broader power to control and license information.

Id.; Phyllis Schlafly, *Copyrights and the Constitution*, EAGLE FORUM (July 2, 2002), http://townhall.com/columnists/phyllisschlafly/2002/07/02/copyrights_and_the_constitution (“The Disney Law mocks the constitutional requirement of “limited times” by extending copyright protection to 95 years.”); See also Brief for Eagle Forum Education and Legal Defense Fund and the Association of American Physicians and Surgeons, Inc. as Amici

“Historically, copyright terms have been quite short.¹¹ As required by Article 1, Section 8, Clause 8 of the U.S. Constitution, copyright can only be granted for ‘limited times.’”¹² Until 1976, the average copyright term was 32.2 years.¹³ Today, the U.S. copyright term is the life of the author, plus seventy years.¹⁴

A useful backdrop to compare this expansion is to the growth, or relative non-growth, of patent terms. Both patents and copyright started at 14 years in

Curiae Supporting Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01618)

The U.S. Constitution is fundamentally different from the rules of the European Union and virtually every other country. The Copyright Clause takes a more limited view of intellectual property than other jurisdictions, thereby allowing creativity and competition to flourish. Europe, for example, generally does not allow the ‘fair use’ that is constitutionally required in the United States.

Id.; HAYEK, *supra* note 3, at 113–14

The problem of the prevention of monopoly and the preservation of competition is raised much more acutely in certain other fields to which the concept of property has been extended only in recent times. . . . It seems to me beyond doubt that in [patents and copyright] a slavish application of the concept of property as it has been developed for material things has done a great deal to foster the growth of monopoly and that here drastic reforms may be required if competition is to be made to work.

Id.; FRIEDMAN, *supra* note 3, at 128

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Id.; Richard Posner, *Do Patent and Copyright Law Restrict Competition and Creativity Excessively?*, BECKER POSNER BLOG (Sept. 30, 2012), <http://bit.ly/1z3o6s5>

Copyright protection seems on the whole too extensive. . . . The most serious problem with copyright law is the length of copyright protection, which for most works is now from the creation of the work to 70 years after the author’s death. . . . The next most serious problem is the courts’ narrow interpretation of “fair use.” . . . The problem is that the boundaries of fair use are ill defined, and copyright owners try to narrow them as much as possible.

Id.; Robert Merges & Glenn Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45, 65-66 (2000)

One possible approach to the constitutional test we advocate would be to examine a proposed extension from the hypothetical perspective of an author . . . could the term of protection possibly serve as additional motivation to set pen to paper, or to sit down at the lab bench? Or does it stretch out so far in time that the latter years of the term are irrelevant to any potential creator? This approach essentially translates proposed patent extensions into the ‘present value’ calculations familiar to accountants. . . . [The Constitution] states a utilitarian, incentive-based rationale for intellectual property protection. If the term of protection could not, under any plausible set of assumptions, serve as an incentive, it fails the constitutional requirement of a forward-looking grant of property rights.

Id.

¹¹ *R Street Policy Study No. 20*, *supra* note 6, at 1.

¹² U.S. CONST. art. I, § 8, cl. 8.; *R Street Policy Study No. 20*, *supra* note 6, at 1.

¹³ LAWRENCE LESSIG, *FREE CULTURE- THE NATURE AND FUTURE OF CREATIVITY*, 135 (Penguin Books 2004).

¹⁴ *R Street Policy Study No. 20*, *supra* note 6, at 1; 17 U.S.C. § 302(a) (2012).

the United States, but patent terms have only had minor increases.¹⁵ Today's patent term is either seventeen years from patent issuance or twenty years from patent filing, whichever is longer.¹⁶ As legal historian Edward Walterscheid puts it, while patents and copyrights were included in the same clause of the Constitution and originally had the same or similar durations, "the statutory patent term has increased by 43% while the statutory copyright term has increased by almost 580%."¹⁷ Congress must justify why a twenty-year term can provide sufficient incentive to inventors, but not to writers and artists.

The Supreme Court has been clear that the ultimate purpose of the Constitution's Copyright Clause is "to stimulate artistic creativity for the general public good,"¹⁸ specifically rejecting the sweat of the brow arguments to justify copyright.¹⁹ Based upon copyright's purpose this Essay will establish that current terms, life of the author plus seventy years, are counter-productive and completely inconsistent from what the Founders had in mind. The Supreme Court, however, has deferred to Congress to set a copyright term consistent with the Constitution.²⁰ While the Court has noted that infinite copyright clearly would be unconstitutional,²¹ they have assessed the current copyright term of life of the author plus seventy years to be, technically, limited.²² Further, in the *U.S. v. Eldred* case, often cited by the content industry as evidence that perpetual extensions of copyright terms are constitutional, the Court never addressed whether current copyright terms are the "functional equivalent of perpetual copyright" because it wasn't presented to the Court on certiorari.²³

The Court's reluctance to restore the public meaning of the Copyright Clause for a truly limited copyright term leaves the task of returning copyright to its original public meaning and purpose up to the other branches – as each

¹⁵ *R Street Policy Study No. 20*, *supra* note 6, at 2; 35 U.S.C. § 154(c)(1) (2012).

¹⁶ 35 U.S.C. § 154(c)(1).

¹⁷ Walterscheid, *supra* note 1, at 389.

¹⁸ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

¹⁹ *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349-50 (1991).

²⁰ *See Eldred v. Ashcroft*, 537 U.S. 186, 192 (2003); *see Golan v. Holder*, 132 S. Ct. 873, 885 (2012).

²¹ *Eldred*, 537 U.S. at 241 (2003) (Justice Stevens dissenting)

The express grant of a perpetual copyright would unquestionably violate the textual requirement that the authors' exclusive rights be only "for limited Times." Whether the extraordinary length of the grants authorized by the 1998 Act are invalid because they are the functional equivalent of perpetual copyrights is a question that need not be answered in this case because the question presented by the certiorari petition merely challenges Congress' power to extend retroactively the terms of existing copyrights.

Id.

²² 17 U.S.C. § 302(a) (2012); *Eldred*, 537 U.S. at 199. In *Eldred* the Court stated that at the time of the Framing, "limited" meant "'confine[d] within certain bounds.'" Therefore, "a time span appropriately 'limited' as applied to future copyrights does not automatically cease to be 'limited' when applied to existing copyrights." *Id.*

²³ *Eldred*, 537 U.S. at 241 (Justice Stevens dissenting).

branch of government has a constitutionally imposed, obligation to ensure that legislation is consistent with the original public meaning of the Constitution.

This Essay will start by identifying the original public meaning of the copyright clause in the Constitution and then argue that restoring constitutional copyright is up to Congress to fix. It will show how a dedicated group of special interests has systematically distorted this system since 1790, specifically since the 1970's. Then it will explore the documented costs of excessive copyright duration of unprecedented length in American history – such long copyright duration that it restricts individual liberty, limits individuals' access to historical material, increases transaction costs for content creators and is resulting in the epidemic of orphan works. Copyright terms 580% longer than those of our Founders significantly impedes digital archiving of our cultural heritage, degrades education and learning opportunities, depresses the amount of publicly available content, and prevents access to our cultural legacy. Perhaps most perniciously, these policies also stifle content creation and hinder artistic ability to create. Lastly this Essay will explore the literature on optimal copyright term duration, and identify the divergence between the interests of content creators and content owners. To restore the original public meaning of copyright, copyright's term must be shortened, and to do so we must reconsider existing international treaties on copyright and not sign any treaty that either would lock in existing terms or extend terms even longer.²⁴ Finally, copyright terms must not be extended to “life plus 100” when the next copyright extension bill may come before Congress in 2018.²⁵

II. CONSTITUTIONAL COPYRIGHT

James Madison and other Founders referred to copyrights and patents as forms of government-granted “monopoly.”²⁶ Madison noted that the Constitu-

²⁴ See TRANS-PACIFIC PARTNERSHIP AGREEMENT DRAFT, ART. QQ.A.2 (2013), available at <http://bit.ly/18vYho6>; *Trans-Pacific Partnership Agreement*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/tpp> (last visited Nov. 6, 2014).

²⁵ See LESSIG, *supra* note 13, at 214.

²⁶ Many in the content lobby relentlessly criticize the use of the term “monopoly” demonstrating just how disconnected their arguments are from an originalism-based analysis. The Founders referred to copyright as a monopoly—this is a verifiable fact. For non-originalist critique by copyright lobby, see Scott Cleland, *The Copyright Education of Mr. Khanna—Part 2 Defending First Principles Series*, PRECURSOR BLOG (Nov. 20, 2012, 13:29), <http://bit.ly/1AAhrrM>

Copyright is property not monopoly. [This terminology choice] is classic Lessig-ian buzzword blackmail to demonize ownership of private property by mischaracterizing property exclusive rights with a word he knows people don't like – monopoly. . . . The only purpose in mischaracterizing property as a monopoly is to promote hostility to property and individual ownership of property separate from the state.

Id.

tion had “limited them [monopolies] to two cases, the authors of Books, and of useful inventions.”²⁷ Most importantly, Madison warned future generations that in “certain cases useful [monopolies like copyrights and patents] ought to be granted with caution, and guarded with strictness against abuse.”²⁸ Madison was skeptical of monopolies, even overtly hostile; however, Madison argued that these two specific monopolies,²⁹ for copyrights and patents, were justified because in these types of monopolies the benefits outweighed the “evil” since they provided an actual community “benefit” and are “temporary.”³⁰ Madison concluded that “under that limitation, a sufficient [recompense] and encouragement may be given,” but reiterated that “perpetual monopolies of every sort, are forbidden not only by the genius of free [governments], but by the imperfection of human foresight.”³¹

But importantly, and what seems to have been completely forgotten, Madison didn’t just say that copyrights and patents are acceptable types of monopoly provided by the government and the others were not, rather his statements made it clear that he perceived all monopolies to be dangerous, and he recognized the dangers and costs associated with copyrights and patents upon society and individual liberty.

In Madison finding that copyrights and patents were justified, he added an ominous warning of their danger and specifically noted that these instruments must be carefully guarded against their “evil effect”:

But grants of this sort can be justified in very peculiar cases only, if at all; the danger being very great that the good resulting from the operation of the monopoly, will be overbalanced by the evil effect of the precedent; and it being not impossible that the monopoly itself, in its original operation, may produce more evil than good.³²

See Terry Hart, *Republican Study Committee Policy Brief on Copyright: Part 1*, COPYHYPE (Nov. 21, 2012), <http://bit.ly/1zcs0CA>. (“There is perhaps no more elementary and persistent error in the history of copyright than the claim that it is a monopoly. And, just as persistently, it has been debunked.”)

²⁷ James Madison, *Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments, CONSTITUTION SOC’Y*, http://www.constitution.org/jm/18191213_monopolies.htm (last visited Nov. 6, 2014) (drafted circa 1817-32, originally appearing as published in *Harpers Magazine* 494, March 1914).

²⁸ *Id.*

²⁹ See Thomas Jefferson to Isaac McPherson (Aug. 18, 1813), in *UNIVERSITY OF CHICAGO THE FOUNDERS’ CONSTITUTION* (Philip B. Kurland & Ralph Lerner eds., 2000), *available at* press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html.

³⁰ Madison, *supra* note 27.

³¹ *Id.*

³² Madison presciently warned that all monopolies, specifically the two provided in the Constitution for copyright and patents, must be “guarded with strictness [against] abuse.” Madison is specifically referring to various forms of monopolies here, including the state granting a monopoly to train operators, but he notes that the US Constitution only allows two monopolies so it seems like his comments here are directly applicable to both copyrights and patents as well as what he considered to be similar types of monopolies for train operators. See Madison, *supra* note 27.

Madison had reason to fear – he was speaking from historical experience. The Founders knew of abuses of monopolies by those with close connections to the king and knew that grants of monopoly were dangerous if left unrestrained.³³ These monopolies were one of the most dangerous powers granted to the government, because it was the state authorizing one entity to restrict the liberty of others, typically for purposes of monetary gain. Likely because of the Founders' fear of this instrument being abused, they left future generations with extremely clear instructions on when these monopolies are appropriate, and with a specific limitation to enforce clear limits. In fact, of everything written in the Constitution, the provisions for providing copyright and patents³⁴ are structurally unique and explicit in a way that perhaps no other provisions of the Constitution are.

According to the Constitution, Copyright law exists specifically “to [p]romote the progress of the sciences.”³⁵ The Constitution tells us in stark, textually unique, language that is nearly as clear as the mandatory minimum age requirement for serving in Congress,³⁶ how many Senators each state receives,³⁷ how many states must ratify a Constitutional Amendment,³⁸ and where bills that raise taxes must originate.³⁹

Of the 18 enumerated powers granted to Congress in Article I, Section 8, the power of Congress to provide copyright and patent monopolies is the only one with a stated purpose, “to promote the progress of science and useful arts.”⁴⁰ The Constitution does not tell us why or for what purposes the federal government can regulate interstate commerce – which in retrospect could have been a useful limitation – and neither does it tell us for what purpose Congress can create an army and navy.⁴¹ As one law textbook describes it, the copyright/patent clause is the only clause with its own “built-in justification.”⁴² To a textualist, the fact that the Founders added a specific purpose for granting Congress this power must be given significant weight. Further, the Founders'

³³ Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 1003 (2013).

³⁴ *Constitutional Law – Copyright Clause – Second Circuit Uphold Perpetual Anti-Bootlegging Protection Against Copyright Clause Challenge*, 121 HARV. L. REV. 1455, 1460 (2007-2008).

³⁵ U.S. CONST. art. I, § 8, cl. 8.

³⁶ *Id.* § 2, cl. 2.

³⁷ *Id.* § 3, cl. 1.

³⁸ U.S. CONST. art. V.

³⁹ U.S. CONST. art. I, § 8, cl. 1.

⁴⁰ *Id.*, § 8, cl. 8.

⁴¹ *See e.g., id.* § 8, cl. 12-13 (does not specify that the army and navy are for defense and offensive operations as opposed to use domestically which would be addressed statutorily through the Posse Comitatus Act years later).

⁴² JAMES BOYLE & JENNIFER JENKINS, *INTELLECTUAL PROPERTY: LAW & THE INFORMATION SOCIETY* 39 (2014) <http://web.law.duke.edu/cspd/pdf/IPCasebook2014.pdf>.

restriction for copyright and patent terms, that they must be only for “limited times,”⁴³ is also unique and specific.

The Supreme Court has acknowledged that “[t]he Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose.”⁴⁴ Copyright laws, like the patent laws, “by constitutional command”⁴⁵ must promote the progress of the sciences and useful arts,⁴⁶ “[t]his is the *standard* expressed in the Constitution and it may not be ignored.”⁴⁷

But as with other enumerated powers of the federal government, Congress has expanded copyright far beyond what was originally intended. Just as Congress frequently neglects to abide by the Origination Clause and the Commerce Clause, it likewise has ignored the Copyright Clause’s requirement that these monopoly instruments be granted only for “limited times.”⁴⁸ Despite Madison’s clear statement that “perpetual monopolies are forbidden,” under current policy, continually elongating copyright terms before they expire, one can come to the conclusion that a perpetual monopoly is effectively what copyright has become.⁴⁹

Until 1976 Copyright terms were a limited, finite number of years, but after 1976 copyright terms shifted to a term length that continues after the death of the creator. Through a similar regular extension of copyright terms, copyright has been, at least for the past several decades, a system of effectively infinite copyright terms.⁵⁰ This distortion has been the result of the influence of a persistent army of special interest lobbyists, usually representing media companies, rather than the interests of creators and the general public.⁵¹

A. Presumptive Constitutionality

Before one begins a substantive discussion on constitutional copyright, the

⁴³ U.S. CONST. art. I, § 8, cl. 8.

⁴⁴ *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5-6 (1966).

⁴⁵ *Id.* at 6.

⁴⁶ U.S. CONST. art. I, § 8, cl. 8.

⁴⁷ *See Graham*, 383 U.S. at 6 (the Court declined to extend this case in *Golan v. Holder* (2012)); *see also* Brief for The Am. Assoc. of Law Libraries, et al. as Amici Curiae Supporting Petitioners at 6, *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

⁴⁸ *Eldred v. Ashcroft*, 537 U.S. 149, 186 (2003).

⁴⁹ Michael Reddy, *Supreme Court Hears Case on Copyright, Mickey Mouse and Congress*, AALL SPECTRUM MAG. 9 (Feb. 2003), <http://bit.ly/1zHrXiE> (“In the United States, we have perpetual copyright on the installment plan.”) (quoting Professor Peter Jaszi of American University’s Washington College of Law testimony before the US. Senate).

⁵⁰ To be clear, this metaphor is solely designed to show the absurdity of the concept of limited times as applied here, not to draw any other form of comparison between copyright terms and prison sentences.

⁵¹ PATRY, *supra* note 4, at 6.

question of adjudication by the courts must first be addressed: if copyright policy is, as this Essay argues, so wildly divergent from the original public meaning of the Founders, then why has the Supreme Court not acted? Further, why is restoring copyright to its original public meaning the business of Congress?

The Court has held that acts of Congress are “presumptively constitutional.”⁵² And the presumption of constitutionality given to acts of Congress is “strong.”⁵³ As the Court explained in *U.S. v. Five Gambling Devices*, “this is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power or is necessary and proper to execution of that power.”⁵⁴ This presumption, however, can create a vicious circle. To illustrate, Congress presumes the Supreme Court will be the final arbiter of constitutionality and then the Court defers to Congress, and with that, Congress assumes the measure to be constitutional, thereby never going through the process of substantively weighing the constitutionality of the legislation. Each branch must have a role in interpreting the Constitution,⁵⁵ and while the Court may only strike down copyright terms that are infinite, Congress should only enact copyright terms that act for the stated purpose of the copyright clause, “to promote the progress of the sciences.”⁵⁶

But in the context of copyright in the past century, Congress has abdicated its role of ensuring their legislation on term length is constitutional, and no longer seriously considers whether copyright terms are consistent with the stat-

⁵² *Turner Broadcasting System, Inc. v. FCC*, 507 U.S. 1301, 1302 (1993).

⁵³ *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953).

⁵⁴ *Id.*

⁵⁵ In 2012, the House Republican Study Committee (“RSC”), a caucus representing over 170 members of the wing of the House Republicans, issued a report (authored by the author of this piece) on this topic that argued: 1) Assessing a law’s constitutionality is not, and should not be, the sole dominion of the judicial branch. All three branches were designed to assess constitutionality... 2) Inaction by Congress can validate unconstitutional actions... 3) The Court may not be able to consider the constitutionality of all legislation because of questions of standing, ripeness, or a lack of bandwidth to hear all cases... 4) Just because the Supreme Court rules something as constitutional—or does not rule something as unconstitutional—does not mean that Congress can’t take subsequent action. DEREK KHANNA, REPUBLICAN STUDY COMM., RSC POLICY BRIEF: CONGRESS’S ROLE AND RESPONSIBILITY IN DETERMINING THE CONSTITUTIONALITY OF LEGISLATION 2-5 (2012) <http://1.usa.gov/1wt4xwt>

Congress has a responsibility to ensure that its legislation is consistent and enabled by the Constitution, but it also must affirmatively act when other branches are violating the Constitution – so as to not validate these unconstitutional actions. Acts of Congress are... ‘presumptively constitutional’ under judicial review, which means that the Court assumes that Congress has deliberated on a law’s constitutionality.

Id.

⁵⁶ U.S. CONST. art. I, § 8, cl. 8.

ed aims of the copyright clause to “promote the progress of the sciences.”⁵⁷ Today, Congress must recognize that current copyright terms are vastly unmoored from the original public meaning of the Copyright Clause, and in any case, poor public policy.⁵⁸

B. Guarding Against Abuse

The Founders were very clear that copyright, as a form of monopoly, must be for only a limited duration. The U.S. Supreme Court has noted the framers’ “instinctive aversion to monopolies [and that it] was a monopoly on tea that sparked the Revolution.”⁵⁹ Historians have cited “antimonopoly sentiments” as one of the roots of the struggle for American independence.⁶⁰ Aversion to monopolies was so strong, that several of the original state constitutions even contained provisions condemning the creation of monopolies.⁶¹ However, at least a few state laws provided express exceptions for copyright/patent types of monopolies.⁶² Massachusetts’ General Court’s Body of Liberties from 1641 stated “[n]o monopolies shall be granted or allowed amongst us, but of such new Inventions that are profitable to the COUNTRY, and that for a short time.”⁶³ Connecticut passed a law in 1672, “[t]hat there shall be no Monopolies granted or allowed amongst us, but of such new Inventions as shall be judged profitable for the Country, and that for such time as the General Court shall judge meet.”⁶⁴

It is against this backdrop, of distinct aversion to monopoly (or at least most forms), that one must interpret the Copyright Clause. The temporal limitation and the specific purpose were clearly of importance to the Founders and, according to Edward Walterscheid’s account, attendees at the ratifying conven-

⁵⁷ *Id.*

⁵⁸ See JERRY BRITO ET AL., COPYRIGHT UNBALANCED: FROM INCENTIVE TO EXCESS 9 (Nov. 12, 2012).

⁵⁹ *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 7 (1966).

⁶⁰ THEODORE. P. KOVALEFF, THE ANTITRUST IMPULSE: AN ECONOMIC, HISTORICAL, AND LEGAL ANALYSIS 5 (M.E. Sharpe, Inc., Vol. I 1994).

⁶¹ See MD. CONST. OF 1776, art. XXXIX (“[M]onopolies are odious, contrary to the spirit of free government, and the principles of commerce...and ought not be suffered.”); See N.C. CONST. OF 1776, art. XXIII (“That perpetuities and monopolies are contrary to the genius of a free state, and ought not be allowed.”).

⁶² See Terry Hart, *Myths From the Birth of US Copyright: Part 2*, COPYHYPE (May 17, 2012), <http://bit.ly/1DRuY3L>.

⁶³ See *id.*; *The Massachusetts Body of Liberties*, HANOVER HIST. TEXTS PROJECT, <http://history.hanover.edu/texts/masslib.html> (last updated Mar. 8, 2012) (digital scan of *Old South Leaflets* Circa 1900 pages 261-80, scanned by Monica Banas in August, 1996).

⁶⁴ Hart, *supra* note 62 (quoting from THE LAWS OF CONNETICUT: AN EXACT REPRINT OF THE ORIGINAL EDITION OF 1673).

tions shared fears of monopoly abuse.⁶⁵ Many states proposed amendments indicating their opposition to any further congressional power to establish monopolies.⁶⁶

Until the early 20th century, there was a general consensus on a limited copyright and Congress generally abided by the original public meaning of the Copyright Clause.⁶⁷ A 1909 report from the Senate Committee on Patents (S. 9440) “to amend and consolidate acts respecting copyright” notes that certain legislation would be beyond the power of Congress.⁶⁸

The bill report stated that copyright law is “not primarily for the benefit for the author, but primarily for the benefit of the public.”⁶⁹ According to the report, “Congress must consider...two questions: [f]irst, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public.”⁷⁰ Congress must use copyright to confer “a benefit upon the public that outweighs the evils of the temporary monopoly.”⁷¹ This report was consistent with a large amount of evidence of our historical tradition.⁷²

The Supreme Court has chosen to not directly strike down continual copyright term extension, and they have deferred determining appropriate copyright terms to Congress. However, their holdings have, at times, clearly enunciated a similar understanding of the history of copyright.⁷³

⁶⁵ Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA J. OF L. & TECH. 1, 6 (2003).

⁶⁶ *Id.*

⁶⁷ *Copyright Timeline: A History of Copyright in the United States*, ASS’N OF RES. LIBR., <http://bit.ly/1wTB4ub> (last visited Nov. 6, 2014).

⁶⁸ COMM. ON PATENTS, TO AMEND AND CONSOLIDATE ACTS RESPECTING COPYRIGHT, H.R. REP. NO. 2222, at 6-7 (1909)

The object of all legislation must be...to promote science and the useful arts...[T]he spirit of any act which Congress is authorized to pass must be one which will promote the progress of sciences and the useful arts, and unless it is designed to accomplish this result and is believed, in fact, to accomplish this result, it would be beyond the power of Congress.

Id.

⁶⁹ *Id.* at 7.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See Madison, *supra* note 27; see also *Copyright Timeline*, *supra* note 67.

⁷³ See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431-32 (1984)

The limited scope of the copyright holder’s statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and the other arts. The immediate effect of our copyright law is to secure a fair return for an “author’s” creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

Id.

The *Sony* decision also cited *Fox Film Corp. v. Doyal*, in which the Court explained: “The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”⁷⁴ Most directly on this point, as Justice Ginsburg mentioned during oral arguments for the *Eldred* case, “there has to be a limit...[p]erpetual copyright is not permitted.”⁷⁵

The Founders understood the limit to be very short, economists argue that it must be short, but the copyright lobby doesn’t want any limit at all and they have succeeded in their goal of continually enlarging copyright terms to eliminate their expiration.⁷⁶

III. THE COPYRIGHT LOBBY

In recent decades, a number of special interests that some conservative activists collectively dubbed the “copyright lobby”⁷⁷ have tirelessly worked to keep their copyrighted works from entering the public domain by continually elongating the term of copyrights. The public policy goals of the copyright inflation movement have been to undermine the Constitution’s text and its original public meaning.⁷⁸ The recapture of works that would be in the public domain represents one of the biggest thefts of “property” in history, and has had significant economic impacts upon our culture, personal liberty and economy. The effects of this grand larceny impact learning, creation and innovation.⁷⁹

⁷⁴ *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

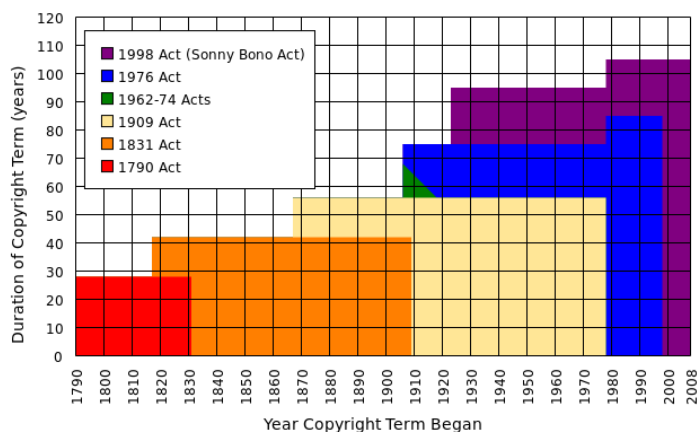
⁷⁵ Transcript of Oral Argument at 29-30, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 31309203.

⁷⁶ *Copyright Extremists Shouldn’t Control Information*, *supra* note 10.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, U.K. INTELL. PROP. OFF. 1, 3, 10 (May 2011), <http://www.ipo.gov.uk/ipreview-finalreport.pdf>.

Figure 1: Copyright duration and the Mickey Mouse Curve

The copyright for 1928's "Steamboat Willie," which introduced the world to Mickey Mouse, was extended by both the 1976 and 1998 amendments to the Copyright Act. It currently is set to expire in 2023.

SOURCE: Tom W. Bell⁸⁰

Current U.S. law provides copyright protection for the life of the author plus seventy years.⁸¹ For corporate authors, the term is 120 years after creation or ninety-five years after publication.⁸² But those changes reflect only part of the reality. In fact, lobbyists have usurped the policy-making process itself to ensure that whenever one term of copyright is set to expire, the law is extended again to make terms even longer.⁸³ Several times, these extensions have even been made retroactively,⁸⁴ re-applying copyright protections to works that already had moved into the public domain. Thus, the degree to which the current "life plus seventy" standard can be relied upon to accurately project when a specific work may move into the public domain is quite limited. The practical effect of this policy has been over the past three decades, effectively, a regime of indefinite copyright.⁸⁵ During oral arguments of the 2002 case of *Eldred v.*

⁸⁰ Tom W. Bell, *Copyright Duration and the Mickey Mouse Curve*, AGORAPHILIA (Aug. 5, 2009), <http://bit.ly/1C8KCpK>.

⁸¹ 17 U.S.C. § 302(a) (2012).

⁸² *Id.* § 302(c).

⁸³ See e.g., Bell, *supra* note 80 (discussing *Steamboat Willie*).

⁸⁴ Copyright Term Extension Act, Pub.L. No.105-298, 112 Stat. 2828; Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2573.

⁸⁵ Jeff John Roberts, *Will Copyright Be Extended 20 More Years? An Old Debate Returns*, GIGAOM (Aug. 20, 2013), <http://gigaom.com/2013/08/20/will-copyright-be-extended-20-more-years-an-old-debate-returns/>.

Ashcroft, Justice Sandra Day O'Connor acknowledged that infinite copyright extension "flies directly in the face of what the framers had in mind, absolutely."⁸⁶

Jack Valenti, then-head of the Motion Picture Academy of America ("MPAA"), testified during the legislative run-up to passage of the 1998's Sonny Bono Copyright Term Extension Act (known colloquially as the "Mickey Mouse Protection Act")⁸⁷ that "copyright term extension has a simple but compelling enticement: it is very much in America's economic interests."⁸⁸ What is the logical extension of this argument? If, according to the MPAA, copyright term extension to life plus fifty is "in America's economic interests," and copyright term extensions to life plus seventy, is again "in America's economic interests" then why would the United States not extend copyright to 800 years; further, how does one reconcile the Founders inclusion of "limited times" at all with this concept? When Valenti says this is in "America's economic interests" which portion of America is he referring to – does it help big Hollywood studios with large content portfolios rake in more rents for longer? Or does it help content creators create more? "America's economic interests" is an extremely vague concept, but the operative question, according to the Constitution, is instead how does a particular policy best "promote the progress of the sciences and useful arts"⁸⁹ – the Constitution says nothing about promoting economic interests for one interest group. Further, despite such assertions, the MPAA has produced no credible research to back up the claim that extending copyright terms is in the U.S. economic interest, while evidence to the contrary is overwhelming.⁹⁰

The extension of copyright, particular to life plus fifty under the Berne Convention, is a direct result of importing foreign law with lobbyists arguing for "international harmonization."⁹¹ As UCLA History Professor Peter Baldwin's new book *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* explains, "[c]opyright's evolution is often told as a story of American cultural hegemony. In fact, the opposite is more plausible. . . the abolition of formalities, the extension of terms, and most fundamentally, the shift of copyright's philosophical underpinnings from statute back towards natural rights. . . British

⁸⁶ Transcript of Oral Argument at 18, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), available at <http://www.aaronsw.com/2002/eldredTranscript>.

⁸⁷ Roberts, *supra* note 85.

⁸⁸ *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989, H.R. 1248, H.R. 1734 Before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, House of Representatives*, 104th Cong. 50 (1995) (statement of Jack Valenti, President and CEO, Motion Picture Association of America) (Hereinafter *Hearing on H.R. 989, H.R. 1248, H.R. 1734*).

⁸⁹ U.S. CONST. art. I, § 8, cl. 8.

⁹⁰ *Hearing on H.R. 989, H.R. 1248, H.R. 1734, supra* note 88 at 111.

⁹¹ *Id.* at 618.

and American law bowed to their content industries.”⁹²

When the idea of international harmonization was first presented in the United States, in the 19th century,⁹³ Congress wisely chose not to disregard the Constitution’s original public meaning of copyright.⁹⁴ Samuel Clemens (known as Mark Twain) testified before Congress in favor of longer copyright terms and importing international law and claimed, “I know that we must have that limit. But forty-two years is too much of a limit. I do not know why there should be a limit at all. . . [however] this limit is quite satisfactory to me—for the author’s life, and fifty years after.”⁹⁵

Congress rejected Mark Twain’s arguments for international harmonization for life plus fifty as would be required in the 1908 version of the Berne Convention (Berlin Act of 1908).⁹⁶ Twain also argued that copyright was his natural right property, something that the Founders rejected.⁹⁷ Twain argued that there was no real negative effect of perpetual copyright because so few works retain any commercial value after the original short copyright term would have expired.⁹⁸ Therefore, the public loses little because it was likely unavailable anyways at that point. Twain was clearly mistaken, and with new technology, his comments are clearly incorrect for the modern economy.

But despite Mark Twain’s stature and influence, he was not able to convince Congress to shake off its adherence to constitutional considerations of copyright in 1906.⁹⁹ Approximately seventy years later, however, interest groups would become sufficiently powerful to convince Congress to disregard much of constitutional copyright and incorporate an international perspective on copyright that is vastly larger in scope and length than the Founders’ concep-

⁹² PETER BALDWIN, *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE*, 260-261 (2014).

⁹³ *Hearing on H.R. 989, H.R. 1248, H.R. 1734, supra* note 88 at 158, 164-65.

⁹⁴ Congress would pass the Copyright Act of 1909 Pub. L. No. 60-349 35 Stat. 1075 (repealed in 1978) (1909), that allowed for copyrighted works to be copyrighted for 28 years, with a renewal of 28 years, but rejected Mark Twain’s plea for life plus fifty or infinite copyright. Congress also kept the requirements that Copyrighted works have a notice of copyright.

⁹⁵ *Mark Twain on the Need for Perpetual Copyright*, THE PUB. DOMAIN (Sept. 9, 2014), <http://bit.ly/13IHLWv>.

⁹⁶ *Id.*

⁹⁷ *Wheaton v. Peters*, 33 U.S. 591, 661 (1834). Congress, in passing the act of 1790, did not legislate in reference to existing rights, appears clear, from the provision that the author, &c. ‘shall have the sole right and liberty of printing,’ &c. Now if this exclusive right existed at common law, and congress were about to adopt legislative provisions for its protection, would they have used this language? Could they have deemed it necessary to vest a right already vested. Such a presumption is refuted by the words above quoted, and their force is not lessened by any other part of the act. *Id.*

⁹⁸ *Mark Twain on the Need for Perpetual Copyright, supra* note 95.

⁹⁹ *See generally* The Copyright Act of 1909 Pub. L. No. 60-349 35 Stat. 1075 (repealed in 1978) (1909).

tion of copyright.¹⁰⁰

Given the historical moorings of short copyright terms, the onus is on special interest groups like the Recording Industry Association of America (RIAA) and the MPAA to substantiate their arguments for copyright terms that deviate wildly from our founding tradition. There is no consistency between copyright terms of fourteen years, and copyright terms longer than the author could be alive for – those are essentially two different types of monopolies. The RIAA and MPAA also “do not know why there should be a limit at all” and have advocated from that perspective.¹⁰¹ Their vested interest is obvious, they believe they can make more money from keeping their copyrights forever, but one special interest group’s vested financial incentive shouldn’t be the only one that Congress hears from or legislates on the basis of – as will be shown in this piece, particularly in the context of copyright terms lengths, it is the only voice heard. Based on the constitutional text, these interest groups must answer logical questions like how do copyright terms of life plus seventy years, applying to everything from books and movies to Facebook messages, “promote the progress of the sciences and useful arts?”¹⁰²

But instead of substantive arguments for perpetual copyright term extension, the MPAA has forwarded claims that bear striking resemblance to their outlandish predictions of doom and gloom that accompanied introduction of the video-cassette recorder, which the MPAA worked to ban through both legislation and litigation.¹⁰³ In 1982, Valenti told Congress:

... [W]e cannot live in a marketplace...where there is one unleashed animal [the VCR] in that marketplace, unlicensed. It would no longer be a marketplace; it would be a kind of a jungle, where this one unlicensed instrument is capable of devouring all that people had invested in...We are going to bleed and hemorrhage, unless this Congress at least protects [our industry against the VCR]... I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone.¹⁰⁴

Track records matter when the same interest groups now make similar claims going forward on what will happen with shorter copyright terms. And

¹⁰⁰ See generally The Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1978); *Hearing on H.R. 989, H.R. 1248, H.R. 1734, supra* note 88, at 187, 618.

¹⁰¹ See Harold Feld, *Op-ed: MPAA/RIAA Lose Big as US Backs Copyright “Limitations”*, ARSTECHNICA (July 8, 2012), <http://bit.ly/1z3qnDE> (discussing the MPAA/RIAA position during the Trans-Pacific Partnership trade negotiations).

¹⁰² U.S. CONST. art. I, § 8, cl. 8.

¹⁰³ Derek Khanna, *A Look Back At How The Content Industry Almost Killed Blockbuster And Netflix (And The VCR)*, TECH CRUNCH (Dec. 27, 2013), <http://techcrunch.com/2013/12/27/how-the-content-industry-almost-killed-blockbuster-and-netflix/>.

¹⁰⁴ *Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary H.R.*, 97th Cong. 2 (1982) (Statement of Jack Valenti, President, Motion Picture Association of America, Inc.).

the track record is not good: we have the data to test Jack Valenti's statements, and he was not just a little wrong, he couldn't have been more incorrect on the market impact. Just two years after the 1984 Supreme Court decision in which the MPAA lost its suit to ban the VCR, revenues from video tape sales and rentals were \$4.38 billion, eclipsing 1986's box office revenues of \$3.78 billion.¹⁰⁵ In 2012, the home media consumption market that the MPAA tried to stamp out blossomed into an \$18 billion dollar market.¹⁰⁶

Policymakers should be highly skeptical – the same industry lobbyists,¹⁰⁷ who claim that longer copyright terms are in our national interest, have a track record of grossly incorrect predictions filled with scare tactics, and fail to provide substantive data to argue in their favor.

While the MPAA and RIAA have never really articulated strong economic arguments for continual renewal of copyright terms, we do know the steep costs to perpetual extension of copyright – those will be documented here. Costs of perpetual copyright have been known for centuries, which is why the British copyright statute of 1710, the Statute of Anne,¹⁰⁸ limited copyright duration to fourteen years; why twelve of the original thirteen colonies had similar copyright durations in their own statutes; why the Constitution includes the phrase “limited times”; and why the Founders limited copyright to fourteen years.¹⁰⁹

IV. COSTS OF EXCESSIVE COPYRIGHT DURATION FAR EXCEED THE LIKELY BENEFITS

As a result of extremely long copyright terms and unclear fair use laws, we have clear evidence that, rather than serving as an incentive to create, excessively long copyright – well beyond what the Founders would support – actually hinders creation. New artists, directors and writers are unable to create derivative works without paying fees that can be so high as to make the cost of derivative works prohibitive or even impossible.¹¹⁰ In a brief submitted during the *Eldred* case, Nobel laureates Milton Friedman, Ronald Coase, James Bu-

¹⁰⁵ Khanna, *supra* note 103.

¹⁰⁶ Thomas K. Arnold, *Home Entertainment Spending Rises for First Time in Five Years*, HOLLYWOOD REP. (Jan. 8, 2013), <http://bit.ly/1Jgk1ch>.

¹⁰⁷ Obviously Jack Valenti died, but Senator Chris Dodd took over for his role and has argued very similar things for the MPAA. See Tim Cushing, *MPAA Head Chris Dodd: I'm Willing to Discuss Copyright Reform As Long As Nothing Changes*, TECHDIRT, (Feb. 11, 2014) <http://bit.ly/1wKUOkW>.

¹⁰⁸ See generally Statute of Anne, 1710, 8 Anne, c. 19 (1710) (Gr. Brit.).

¹⁰⁹ *Hearing on H.R. 989, H.R. 1248, H.R. 1734, supra* note 88, at 164-67.

¹¹⁰ DEREK KHANNA & JOHN TEHRANIAN, COMMENTS ON DEPARTMENT OF COMMERCE GREEN PAPER, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 5, 20 (2013).

chanan, George Akerlof, Kenneth Arrow and eleven other economists argued that a “lengthened copyright term...keeps additional materials out of new creators’ hands” and ultimately results in “fewer new works” and “higher transaction costs in the creation of some works.”¹¹¹ The economists argued that the 1998 extension is inefficient and “reduces consumer welfare,” as consumers are denied the ability to acquire derivative works and content that otherwise would be in the public domain.¹¹²

In fact, even John Locke, often touted by content industry proponents as the basis for their arguments for copyright extension,¹¹³ recognized the harm of excessively long copyright terms, he simply disagreed on what was excessively long. John Locke was opposed to the copyright statute of his day,¹¹⁴ and during the debate on the Licensing Act of 1693, he wrote a letter to MP Edward Clarke¹¹⁵ arguing, “This I am sure, it is very absurd and ridiculous that any now living should pretend to have property in, or a power to dispose of, the propriety of any copy or writings of authors who lived before printing was known or used in Europe.”¹¹⁶ Locke went on to argue, “That any person or company should have patents for the sole printing of ancient authors is very unreasonable and injurious to learning....”¹¹⁷

¹¹¹ Brief of George A. Akerlof, et al. in Support of Petitioner at 16-15 *Eldred v. Ashcroft*, 537 U.S. 186 (2002) (No. 01-618).

¹¹² *Id.* at 3.

¹¹³ Terry Hart, *Rehabilitating Locke: The Labor Justification of Copyright*, COPYHYPE (Mar. 5, 2012), <http://bit.ly/1v0qSvU>

In Locke’s words, man is a “proprietor of his own person”, and because of this, as Mossoff interprets Locke, “value-creating, productive labor is a moral activity that creates in the laborer a moral claim to the products of his labor.” These principles have served society well, and no technological innovation can render them obsolete.

Id. PAUL CLEMENT, VIET DINH & JEFFREY HARRIS, *THE CONSTITUTIONAL AND HISTORICAL FOUNDATIONS OF COPYRIGHT PROTECTION 2* (2012), available at <http://bit.ly/1Jgprc> (“The theoretical underpinnings of copyright law are based heavily on the work of John Locke, “one of the Enlightenment thinkers who most influenced the Founders. . . If anything, under Locke’s theory, intellectual property should be even more worthy of protection than physical property.”) (readers be aware that this article has been thoroughly debunked by fact checkers and misleads readers on factual basis of copyright); Peter Fricke, *Conservatives Split on Copyright, Intellectual Property*, DAILY CALLER (Sept. 5, 2014), <http://bit.ly/YLMxQj> (During a debate on Capitol Hill, “[Phil] Kerpen drew on the writings of John Locke to contend that individual ownership of intellectual property is earned through the labor that creates it, saying that, ‘no property can be more clearly a person’s own than property of the mind.’”).

¹¹⁴ See Justin Hughes, *Locke’s 1694 Memorandum (and more incomplete copyright Historiographies)*, 27 *CARDOZO ARTS & ENT. L.J.* 555, 561 (2010) (some commentators point out that the “printing privileges that Locke was criticizing. . . were not ‘copyright’ at all.”).

¹¹⁵ *Id.* at 556.

¹¹⁶ See *id.* at 558 (“Locke was quite consciously opposed to the idea of perpetual exclusive rights in expressive works. Halfway through the memorandum, he objects to exclusive rights ‘in any book which has been in print fifty years.’”).

¹¹⁷ *Id.* at 571.

To be clear, Locke was in favor of very long copyright – he was in favor of either fifty-year copyright terms,¹¹⁸ or if the work was bought by a publisher, in favor of terms of life of the author plus fifty or life plus seventy terms¹¹⁹ – but even Locke recognized that perpetual copyright was detrimental. The Founders were generally familiar with the work of John Locke, although it's less clear if they were specifically aware of Locke's work on copyright, and they seem to also have agreed that allowing any person to have a monopoly for "ancient authors" is "unreasonable and injurious to learning," but while Locke was advocating for a long copyright term, the British and then the Founders explicitly rejected this position, seemingly finding that the effects that Locke was worried about manifested themselves sooner than life of the author plus fifty years, as quickly as fourteen years.¹²⁰

Modern data establishes that Locke correctly recognized that perpetual copyright was detrimental to learning and content creation – but that Locke's prescription for optimal copyright was much too long for achieving a proper balance between interests to "promote the progress of the sciences and useful arts."¹²¹ This is what the British and Founders thought even in the 18th century, as while Locke was arguing for life plus fifty/seventy copyright, the British chose fourteen years.¹²² The Founders' explicit rejection of Lockean style copyright (particularly in the context of term length, but also in what is copyrightable), makes it particularly egregious, and intellectually dishonest, that today the content industry uses John Locke for the basis of many of their talking points.¹²³

¹¹⁸ See *id.* at 558 (quoting John Locke- "in any book which has been in print fifty years.").

¹¹⁹ See *id.* at 559 ("When a publisher purchases rights 'from authors that now live and write, it may be reasonable to limit their property to a certain number of years after the death of the author, or the first printing of the book, as, suppose, fifty or seventy years.'").

¹²⁰ Even with this history, the content industry has even gone so far as to argue that Britain somehow agreed with John Locke and implemented his plan, "Locke's views heavily influenced the development of copyright principles in England in the seventeenth and eighteenth centuries." See CLEMENT ET. , *supra* note 113, at 3. Britain transitioned from monopolies for stationers to monopolies for authors, but to conclude that Britain was heavily influenced is ridiculous, Britain adopted copyright terms of 14 + 14 copyright terms in the Statute of Anne. See Statute of Anne, 1710, 8 Anne, c. 19 (1710) (Gr. Brit.).

¹²¹ U.S. CONST. art. I, § 8, cl. 8.

¹²² See 8 Anne, c. 19.

¹²³ There is some dispute on how well John Locke's work on copyright was known to the Founders, but it's largely irrelevant, if Locke's work on copyright was well known to the Founders, then the Founders explicitly rejected an option presented to them by Locke and therefore Locke's opinions carry almost no weight for an originalist analysis, other than the opposite of his arguments being bolstered. And if Locke's work on copyright wasn't known to the Founders, then his opinion is interesting, but not valid in analyzing what the Founders actually did, surely the British were aware of Locke's opinions and they rejected his opinions on term length in particular—so the Founders followed the British decision to reject

Despite the content industries obsession with using Locke to argue their case, even John Locke recognized the importance of a balance between at least two interests, one the interests of providing a sufficient incentive to create, market, disseminate and improve/invest in content and two, the interests of everyone else, from the general public to other content creators; Locke just believed this balance was found at a much longer term.¹²⁴ Lord Mansfield¹²⁵ explained this balance well over 200 years ago:

[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.¹²⁶

Acknowledging the cost of excessively long copyright, while praising the benefit of copyright existing, as the Founders did, is critical to understanding why copyright must expire – not merely because that is what the Constitution prescribes, but because it is good policy.¹²⁷

A. Restricting Individual Liberty

The Founders understood well the costs of keeping older content behind a locked vault affects creativity in a number of ways, but in addition these monopolies restrict individual liberty.¹²⁸ Copyrights and patents have their origins in the British crown's policy of granting to chosen benefactors exclusive monopolies for creation of certain common products.¹²⁹ Such monopolies unquestionably were recognized as restricting freedom.¹³⁰

Copyrights and patents continue to act, in some ways, as restrictions upon

Locke's term lengths. See Hughes, *supra* note 114, at 559.

¹²⁴ *Id.*

¹²⁵ Chief Justice William Murray, 1st Earl of Mansfield is more commonly known as "Lord Mansfield." Lord Mansfield was appointed to the King's Bench in 1756 and served until 1788. He was known for his valuable contributions to legal field, particularly in commercial law. See *William Murray, 1st earl of Mansfield*, ENCYCLOPEDIA BRITANNICA, <http://bit.ly/1wt93em> (last visited Sept. 10, 2014).

¹²⁶ *Cary v. Longman*, 102 Eng. Rep. 138, 140 n. (b) (1801) (citing *Sayre v. Moore*, 102 Eng. Rep. 139, 140 (K.B. 1785)).

¹²⁷ See *Why Disney Has Clout with the Republican Congress*, *supra* note 10.

¹²⁸ Randolph J. May & Seth L. Cooper, *Perspectives from FSF Scholars Vol. 8, No. 20 – The Constitution's Approach to Copyright: Anti-Monopoly, Pro-Intellectual Property Rights*, FREE STATE FOUND. 2-3 (Aug. 26, 2013), <http://bit.ly/1w62F7y>.

¹²⁹ See Dinusha Mendis, *The Historical Development of Exceptions to Copyright and Its Application to Copyright Law in the Twenty-first Century*, 7.5 ELECTRONIC J. OF COMP. L. (Nov. 2003), available at <http://www.ejcl.org/ejcl/75/art75-8.html> ("...[I]n 1709 the British Parliament produced the most significant breakthrough in the history of copyright law and introduced the first piece of copyright legislation in the world [...].").

¹³⁰ *Id.*

creation, speech and personal liberty.¹³¹ Under the Constitution, those restrictions are justified on grounds that they are necessary to provide incentives for creative genius, but they remain restrictions nonetheless.¹³² By conception, copyright's restriction on personal liberty may sometimes be justified and necessary to enforce the statutorily created property rights ability to monetize properly, such as restrictions on bootlegging CD's or on selling books written by another, but in the extreme these same policies often have effects that are much more pernicious and difficult to justify.

As one clear illustration of the costs of extremely long copyright, recently Warner/Chappell has claimed a copyright to "Happy Birthday to You,"¹³³ which the Guinness World Records book calls the most famous song in the English language.¹³⁴ Their copyright claim is based upon a published version of piano arrangements from 1935.¹³⁵ Warner/Chappell is a major record label representing Madonna and Michael Jackson's estate, not a fly by night operation.¹³⁶ So far they have collected an estimated over \$2 million a year in licensing fees from thousands of people that they have forced to pay licensing fees.¹³⁷ According to one estimate, it is the song that earns the highest royalty rates.¹³⁸

Every time someone wants to use a portion of this song in a movie, television program, or stage performance they have to pay a license fee or risk being sued.¹³⁹ And this is also true for "public performances" which would generally include the music played at restaurants and sports arenas, which require a license.¹⁴⁰ It has been reported that restaurants such as Applebee's and Shoney's have developed songs that are used instead of "Happy Birthday to You" to avoid copyright infringement and avoid paying hefty royalties.¹⁴¹ This is a cost that our society bears, not being able to hear the song that individuals prefer to hear. Under current copyright law, "Happy Birthday to You" will remain under

¹³¹ Tom W. Bell, *Copyright as Intellectual Property Privilege*, 57 SYRACUSE L. REV. 523, 529-30 (2007).

¹³² *Id.* at 526-27.

¹³³ *NY Suit Filed Over Copyright to 'Happy Birthday to You,' World's Most Famous English Song*, STAR TRIBUNE, <http://strib.mn/13kKRz9> (last updated June 13, 2013).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Robert Brauneis, *Copyright and the World's Most Popular Song*, 56 J. COPYRIGHT SOCIETY U.S.A. 335 (2009), available at <http://bit.ly/1JgFWQp>.

¹³⁸ Mike Masnick, *Lawsuit Filed to Prove Happy Birthday Is In the Public Domain; Demands Warner Pay Back Millions of License Fees*, TECHDIRT (July 13, 2013), <http://bit.ly/1yVTwDE>.

¹³⁹ *Id.*; See *Licensing Help*, ASCAP, <http://www.ascap.com/licensing/licensingfaq.aspx#general>.

¹⁴⁰ Masnick, *supra* note 138; See *Licensing Help*, *supra* note 139.

¹⁴¹ Rose Desrochers, *The Song Happy Birthday to You is Protected by Copyright*, STREET DIRECTORY, <http://bit.ly/1AAm1WN> (last visited Oct. 8, 2014).

copyright until 2030, but we should expect a potential push to continue to expand copyright even further beyond 2030.¹⁴²

However, the authenticity of the copyright claim from 1935 is itself under dispute, with others arguing that the song was written earlier and by someone else.¹⁴³ Robert Bruneis of The George Washington University Law School argued persuasively that Warner/Chappell does not own a lawful copyright to this song, but while the Court tries to sort this out, people will have to pay rents to Warner/Chappell to publicly perform the most famous song in the English language.¹⁴⁴ This will discourage some people from performing this song publicly, and it does so for no cognizable reason.

B. Limiting Historical Works

*Eyes on the Prize*¹⁴⁵ is one of the most important documentaries on the civil rights movement. But many potential younger viewers have never seen it, in part because license requirements for photographs and archival music make it incredibly difficult to rebroadcast.¹⁴⁶ The director, Jon Else, has said “it’s not clear that anyone could even make ‘Eyes on the Prize’ today because of rights clearances.”¹⁴⁷ The problems facing *Eyes on the Prize* are a result of muddled and unclear case law on fair use, but also copyright terms that have been greatly expanded. If copyright terms were fourteen years, as they were in 1790,¹⁴⁸ then the rights to short video clips for many of these historical events would be in the public domain.

Excessively long copyright terms help explain why Martin Luther King’s *I Have a Dream* speech is rarely shown on television, and specifically why it is almost never shown in its entirety in any other form.¹⁴⁹ In 1999, CBS was sued for using portions of the speech in a documentary.¹⁵⁰ But if copyright terms

¹⁴² *Id.*

¹⁴³ G.F., *The Economist explains: Why are the rights to “Happy Birthday in dispute?”*, *ECONOMIST* (Jun. 16, 2013, 11:50 PM), <http://econ.st/1sOMX6e>.

¹⁴⁴ Bruneis, *supra* note 137, at 389-90.

¹⁴⁵ *Eyes on the Prize* (PBS television broadcast Jan. 21, 1997).

¹⁴⁶ See *Copyright Issues Block Broadcast of Award-Winning Civil Rights Documentary “Eyes on the Prize,”* *DEMOCRACY NOW!* (Feb. 8, 2005), <http://bit.ly/1v8ffUy>; see also *American Experience: Eyes on the Prize: About the TV Series*, *PUBLIC BROADCASTING SERVICE* (PBS) (Aug. 23, 2006), <http://www.pbs.org/wgbh/amex/eyesontheprize/about/index.html>.

¹⁴⁷ Nancy Ramsey, *The Secret Cost of Documentaries*, *N.Y. TIMES*, Oct. 16, 2005, at A23.

¹⁴⁸ Copyright Act of 1790, ch. 7, 1 Stat. 124 (1790) (repealed 1909).

¹⁴⁹ Lauren Williams, *I Have a Copyright: The Problem With MLK’s Speech*, *MOTHER JONES* (Aug. 23, 2013 5:00 AM), <http://bit.ly/1itaHm1>.

¹⁵⁰ *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1212-13 (11th Cir. 1999).

were shorter than fifty years, then those clips would be available for anyone to show on television, in a documentary or to students.

When historical clips are in the public domain – learning flourishes. Martin Luther King did not need the promise of copyright protection for “life plus seventy years” to motivate him to write the *I Have a Dream* speech. He wrote the speech because of the March on Washington and because he hoped to inspire Congress to pass civil rights legislation. King gave the speech for political reasons and for historical value. He wanted it to be quoted and to inspire future generations – and he clearly succeeded.¹⁵¹

Yet today, generations of schoolchildren are denied the ability to watch this speech, a clear abuse of the intent for copyright to promote “the progress of science and the useful arts.”¹⁵² Furthermore, King’s speech itself built upon other works, referencing the *Bible*, the *Gettysburg Address*, *My Country*, *Tis of Thee* and William Shakespeare.¹⁵³ The speech would not exist, at least not in any form recognizable to us, without the ability to build on the works of others but now generations after him are often unable to build upon his masterpiece. Generations of these historical artifacts now lay fallow behind locked vaults of copyright.

C. Increasing Transaction Costs

Judge Richard Posner has called the perpetual lengthening of copyright terms “the most serious problem with copyright law.”¹⁵⁴ As Posner notes, the

¹⁵¹ However, it should be noted the King Estate quickly registered the speech for copyright protection with the Library of Congress. This may have been done for him to be able to protect access to his speech, or it may have been done to monetize the speech. But at the point today where students can’t access the speech because of costs, this is clearly not what he would have intended. Any financial benefit from the speech was surely ancillary. See also Mark Leiser, *King of Copyright: On the 50th anniversary of ‘I have a dream’, Martin Luther King’s estate limits use of landmark speech*, THE DRUM (Aug. 26, 2013, 1:46PM), <http://bit.ly/1zF30TM>.

¹⁵² U.S. CONST. art. I, § 8, cl. 8.

¹⁵³ Vera Chan & Max Zimbert, *The Inspirations Behind “I Have a Dream,”* YAHOO! NEWS (Aug. 28, 2013, 5:29 AM), <http://yhoo.it/1zHzga2>; see Rev. Martin Luther King, Jr., Keynote Address at the Wash., D.C. Civil Right March: I Have A Dream (Aug. 28, 1968).

¹⁵⁴ Posner, *supra* note 10; Posner explains some of the problems with the extension:

(1) [T]racing costs increase with the length of copyright protection; (2) transaction costs may be prohibitive if creators of new intellectual property must obtain licenses to use all the previous intellectual property they seek to incorporate; (3) because intellectual property is a public good, any positive price for its use will induce both consumers and creators of subsequent intellectual property to substitute inputs that cost society more to produce or are of lower quality, assuming (realistically however) that copyright holders cannot perfectly price discriminate; (4) because of discounting to present value, incentives to create intellectual property are not materially affected by cutting off intellectual property rights after many years, just as those incentives would not be

tracing costs may be a significant barrier.¹⁵⁵ The tracing costs occur because it's difficult to figure out whether works are in the public domain or under copyright and, if under copyright, whom to contact and the price to license the work.¹⁵⁶ Works published before 1923 are in the public domain,¹⁵⁷ but works between 1923 and 1964 are in a potential grey area, often depending on whether the author renewed the copyright.¹⁵⁸ The only official records of renewal are held by the Copyright Office in Washington, DC; however, records before 1978 are not available online.¹⁵⁹ So in order to license a photograph, movie, or book from before 1978, you may have to go to the Copyright Office in person and research using the paper card catalogs or pay the copyright office \$165 an hour to search the record.¹⁶⁰ Once one figures out who registered the work, when it was filed, and if it was renewed, it may still be legally complex to determine if it is under copyright or in the public domain. Cornell¹⁶¹ helped by putting together a complicated chart to help determine the status of a work, but as one of the creators of the chart for Cornell explains “[e]ven with the chart in hand, it is impossible to determine absolutely the scope of the public domain in the U.S. or to say with 100% certainty that a work has risen into the public domain.”¹⁶² Therefore, he wrote a 3600 word guide to supplement the chart to help decide if a work is in the public domain or not.¹⁶³ This is legal complexity assuming that one knows all the facts like who the lawful owner is of the work and when and where it was registered. This lack of clarity in the law itself increases the transaction costs further.

D. Creating Orphan Works Epidemic

The mass epidemic of “orphan works” is largely a result of excessively long copyright terms,¹⁶⁴ and demonstrates how copyright can act as a restraint on

materially affected if...lucrative new markets for the copyrighted work, unforeseen when the work was created, emerged.

WILLIAM M. LANDES & RICHARD A POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 213 (Belknap Press, 1st ed., 2003).

¹⁵⁵ *Id.*

¹⁵⁶ *R Street Policy Study No. 20, supra note 6, at 10.*

¹⁵⁷ *Id.*

¹⁵⁸ Teri Karobonik, *The Public Domain: Now Available for Only \$165 An Hour*, TECH DIRT (July 16, 2013), <http://bit.ly/1wTFWQ2>.

¹⁵⁹ *R Street Policy Study No. 20, supra note 6, at 10.*

¹⁶⁰ *Id.*

¹⁶¹ *See Copyright Term and the Public Domain in the United States*, CORNELL UNIV. (Jan. 1, 2014), <http://copyright.cornell.edu/resources/publicdomain.cfm>.

¹⁶² Peter B. Hirtle, *When is 1923 Going to Arrive and Other Complications of the U.S. Public Domain*, INFO TODAY (September 2012), <http://bit.ly/OQtVJD>.

¹⁶³ *Id.*

¹⁶⁴ *See PATRY, supra note 4, at 192-195.*

personal liberty and content creation.¹⁶⁵ Orphan works arise when the rights holder for a work is not apparent and it's either too expensive or, indeed, impossible to determine who is entitled to compensation.¹⁶⁶ The prevalence of orphan works creates a number of problems for the content industry.¹⁶⁷ If you can't track down who owns rights in the work, you can't use the work.¹⁶⁸

This problem was nearly nonexistent when copyright terms were shorter, and when it required formalities, but the perpetual extension of copyright has rendered large quantities of content un-reproducible.¹⁶⁹ It means those videos, books and music effectively are off limits to society, while the heirs to those works receive nothing. It's a policy nightmare that hurts everyone, including interests the copyright lobby claims to represent. It is also a clear demonstration of how copyright policy limits personal liberty, when individuals can't reproduce or remix these works for any price.

This self-inflicted wound has real-world consequences.¹⁷⁰ As the Copyright

¹⁶⁵ See DENISE TROLL COVEY, CARNEGIE MELLON UNIV., RESPONSE TO LIBRARY OF CONGRESS NOI ON ORPHAN WORKS AND MASS DIGITIZATION 18 (2013), available at <http://bit.ly/13kL5pG>; see also Louis Menand, *Crooner in Rights Spat*, THE NEW YORKER (Oct. 20, 2014), <http://nyr.kr/1sH8xID>.

Once you buy a book, you can legally do almost anything to it. You can sell it to someone else, you can tear the pages out, you can throw it on a bonfire. God knows you can print terrible things about it. But you cannot make copies of it. The right to do that belongs to the author of the book and his or her heirs and assigns.

Id.

¹⁶⁶ See U.S. REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 1 (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf> (defining orphan works)

[Orphan works is] a term used to describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner. Even where the user has made a reasonably diligent effort to find the owner, if the owner is not found, the user faces uncertainty – she cannot determine whether or under what conditions the owner would permit use.

Id.

¹⁶⁷ MARIA A. PALLANTE, U.S. COPYRIGHT OFFICE, THE NEXT GREAT COPYRIGHT ACT, 332-33 (2013) available at http://copyright.gov/docs/next_great_copyright_act.pdf (referencing Letter from David J. Kappos, Under Sec'y of Commerce for Intellectual Prop., to Maria A. Pallante, Register of Copyrights: “expressing his support for the ‘work that the U.S. Copyright Office is doing to examine the problem of orphan works’ and noting that “it is in the leadership interests of the United States to explore solutions.”).

¹⁶⁸ See U.S. REGISTER OF COPYRIGHTS, *supra* note 166

Many users of copyrighted works have indicated that the risk of liability for copyright infringement, however remote, is enough to prompt them not to make use of the work. Such an outcome is not in the public interest, particularly where the copyright owner is not locatable because he no longer exists or otherwise does not care to restrain the use of his work.

Id.

¹⁶⁹ Orphan Works, 70 Fed. Reg. 3739, 3742 (2005).

¹⁷⁰ See, e.g., PATRY, *supra* note 4, at 190 (“The BBC has 1 million hours of programming in its archives that are unusable because the rights holders are unknown...”); see, e.g., HER

Office concluded in 2006, “legislation is necessary to provide a meaningful solution to the orphan works problem as we know it today.”¹⁷¹ The legislation that would best fix the problem is to have significantly shorter copyright terms.¹⁷² In 2012, the Library of Congress, while noting the arguments in favor of copyright extension, explained that “extend[ing] the duration of copyright...increased the likelihood that some copyright owners would become unlocatable.”¹⁷³ And the “net result” of copyright extension “has been that more and more copyright owners may go missing.”¹⁷⁴

The issue of orphan works likely would have been alien to the Founders. In addition to the much shorter fourteen-year term, copyrights originally had to be deposited in the District Court for the jurisdiction of the proprietor, and then with the Office of the Secretary of State, who would keep a copy.¹⁷⁵ While the Founders allowed copyright holders one renewal term, for a maximum term of twenty-eight years, without an affirmative action to renew, a work would automatically enter the public domain.¹⁷⁶ Thus, every work that could be under copyright would have had a paper trail to track down, at most fourteen years out of date, and there could be no debate on which works were under copyright or who the rights holder was.

As the Library of Congress explained, the status quo where millions of works cannot be used because the owner cannot be identified or located is a state of affairs, as a result of current copyright policy, directly contradicts the constitutional purpose of copyright: “to promote the [p]rogress of [s]cience.”¹⁷⁷

E. Depressing Volume of Publicly Available Content

The copyright lobby sometimes counters that a “public domain work is an orphan.”¹⁷⁸ The previous head of the MPAA, Jack Valenti, explained that, in

MAJESTY’S TREASURY, GOWERS REVIEW OF INTELLECTUAL PROPERTY 69 (2006) *available at* <http://bit.ly/1w66VDY> (the British museums hold 19 million photographs, of which ninety percent lack rights-holder identification); *see* DUKE CENTER FOR THE STUDY OF THE PUB. DOMAIN, *Orphan Works: Analysis and Proposal* 3 (2005) *available at* <https://web.law.duke.edu/cspd/pdf/cspdproposal.pdf> (the Library of Congress declared that “the urgency may be greatest” for restoring these orphan films, because these works are literally disintegrating).

¹⁷¹ *See* U.S. REGISTER OF COPYRIGHTS, *supra* note 166, at 7.

¹⁷² *See* PATRY, *supra* note 4, at 56-58.

¹⁷³ Orphan Works and Mass Digitization, 77 Fed. Reg. 64555, 64556 (Oct. 22, 2012).

¹⁷⁴ *Id.*

¹⁷⁵ *Compare* Copyright Act of 1790, ch. 7, 1 Stat. 124 (1790) (repealed 1909); *with* Orphan Works and Mass Digitization, 77 Fed. Reg. at 64556.

¹⁷⁶ ch. 7, 1 Stat. 124 (repealed 1909).

¹⁷⁷ Orphan Works and Mass Digitization, 77 Fed. Reg. at 64555; U.S. CONST. art. I, § 8, cl. 8.

¹⁷⁸ Robert A. Baron, *Metaphor And Polemic In The Wars Over The Public Domain*, 2

regard to public domain works, “[n]o one is responsible for its life. But everyone exploits its use, until that time certain when it becomes soiled and haggard, barren of its previous virtues.”¹⁷⁹ The head of the RIAA explains that “there is all but zero value to a record company in a public domain recording.”¹⁸⁰ The Institute for Policy Information, an MPAA-funded organization,¹⁸¹ offered in a recent blog post on its website that:

[T]he public domain is, in fact, a vast wasteland where a modest number of public works remain in circulation, but where almost everything disappears into obscurity, because the loss of ownership and control means no one any longer has any incentive to promote the distribution of the works or to popularize them.¹⁸²

In their brief before the Supreme Court, the Nashville Songwriters Association went even further, arguing that the public domain is nothing more than “legal piracy.”¹⁸³ Considering the Founders’ copyright regime had a fourteen-year term, required registration and didn’t apply to foreign works, that’s an awful lot of “legal piracy” they permitted.¹⁸⁴ If the logical extension of a special interest group’s argument is that the Founders were “pirates” then perhaps academics should be skeptical of such a claim – particularly because their claims are a testable hypothesis.

Further, these groups have a track record of disinformation and their claim that public domain content will become unavailable to the public echoes the scare tactics the content lobby used in its campaign to ban the VCR and, later, litigation against the first MP3 player (the Rio) and the first digital video recorder (Replay TV).¹⁸⁵

Today, there is enough information to assess the validity of these claims with data. And the data firmly establishes that their claims are simply not true. When books enter the public domain, there is an explosion in readership and availability, because public domain works can be provided for free online.¹⁸⁶ In

ART & MUSEUM L. J. 1, 11 (2007).

¹⁷⁹ *A Plea For Keeping Alive the U.S. Film Industry’s Competitive Energy: Hearings on S. 483 Before the S. Judiciary Comm.*, 104th Cong. 1 (1995), available at <http://www.peteryu.com/intrade/valenti.pdf> (statement of Jack Valenti, Motion Picture Association of America).

¹⁸⁰ MARIA A. PALLANTE, U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDING 102 (2011), available at <http://www.copyright.gov/docs/sound/pre-72-report.pdf>.

¹⁸¹ Motion Picture Association of America Inc., IRS Form 990 Tax Filing, 2011.

¹⁸² Tom Giovanetti, “*You Didn’t Build That*” Comes to Copyright, IPI ROUNDTABLE (Feb. 15, 2014), http://www.ipi.org/policy_blog/detail/you-didnt-build-that-comes-to-copyright.

¹⁸³ Brief of Respondent at 10 n. 7 *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

¹⁸⁴ Copyright Act of 1790, ch. 7, 1 Stat. 124 (1790) (repealed 1909).

¹⁸⁵ *R Street Policy Study No. 20*, supra note 6, at 11.

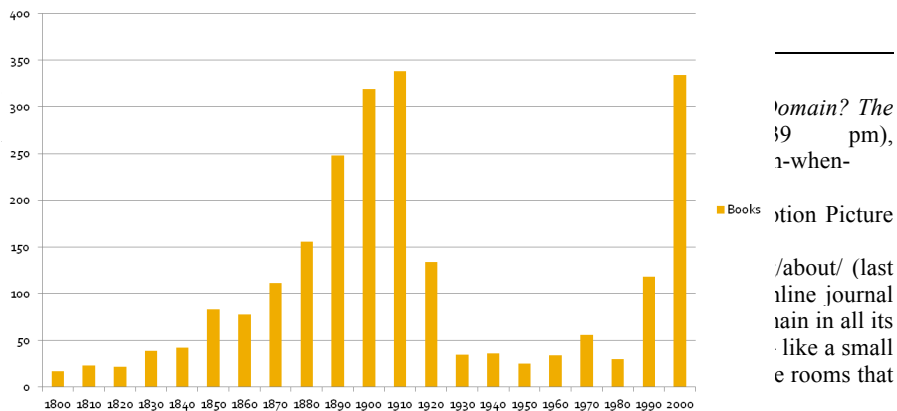
¹⁸⁶ Timothy Taylor, *Absurdities of Copyright Protection*, *Conversable Economist*, CONVERSABLE ECONOMIST (May 13, 2014), <http://conversableeconomist.blogspot.com/2014/05/absurdities-of-copyright->

fact, we know today that works are significantly more available once they enter the public domain.¹⁸⁷ In defense of Jack Valenti, the content industry has generally been far behind the wave of modern technology, and some of Valenti's statements on the public domain from 1995¹⁸⁸ predated the modern Internet and the collapse of the cost of storage which has made individuals and enthusiasts easily able to make public domain ebook's available to the world for free. While this obviously has had a negative effect on widespread unauthorized access to copyrighted works, cheap online storage and fast internet connections have had a significantly beneficial impact on lawful access to public domain works.¹⁸⁹

A 2012 review of Amazon's book sales showed that books published after the critical public domain cut-off date of 1923, works under copyright just before they would enter the public domain but very old, are available at a dramatically lower rate than books from the prior century which are extremely old.¹⁹⁰ This data doesn't make sense, unless the public domain increased its availability, since one wouldn't expect that works from the 19th century would be normally more available than those from the early 20th century. This phenomenon is what *The Atlantic Magazine* has referred to as *The Missing 20th Century*.¹⁹¹

The spike in availability starts right after works enter the public domain.¹⁹² This study shows there are 700 percent more books available from the 1910s than from the 1950s, even though there were many more books published in the 1950s.¹⁹³

Figure 2: New books from Amazon warehouse by decade¹⁹⁴



¹⁹⁰ Taylor, *supra* note 186.

¹⁹¹ Rebecca Rosen, *The Missing 20th Century: How Copyright Protection Makes Books Vanish*, THE ATLANTIC (Mar. 30, 2012), <http://theatlntc/1zcC0Nz>.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ This chart is a double peak, newer works under copyright are available of course, as demand is highest for brand new works. But the other peak is for the 1910's, the last decade of works largely in the public domain and available without paying a copyright royalty.

SOURCE: Paul Heald

This type of evidence is not limited to book availability. Another study by the same economist showed that when books enter the public domain, audio versions of those works become significantly more available and are of equal quality to those of copyrighted books.¹⁹⁵ The creation of audiobooks is clear evidence of the market “taking care of the content” and “promoting distribution” with or without a clear financial motive.¹⁹⁶ As of publication, there appears to be no counter-study to contradict the findings of these studies.

F. Preventing Access to Cultural Legacy: Video

The content industry’s claim¹⁹⁷ that enabling the public domain will hinder consumers’ access to those works, or maintain those works for posterity, is not only contradicted by the empirical evidence, but also implies the content industry itself is doing a good job investing in the commercialization, availability and preservation of older copyright works — when overwhelming evidence demonstrates that in several mediums – movies, television and video games in particular – industry is doing a terrible job of preserving our cultural legacy and making them available to the public. If copyright expired for older works, then an active fan base is likely to keep these works protected for posterity and available for others.

To be clear: this is unlikely some malicious activity on their part; rather, as rational economic actors they simply have limited or no economic incentive in preserving works that they perceive as having marginal economic monetization

¹⁹⁵ Paul Heald & Christopher Buccafusco, *Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension*, 28 BERKELEY TECH. L. J. 1 (2013) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2130008 (Paul Heald on the public domain).

¹⁹⁶ *R Street Policy Study No. 20*, *supra* note 6, at 12.

¹⁹⁷ See Heald & Buccafusco, *supra* note 195.

opportunities. Further, any economic commercialization opportunities for older content may come at the expense of selling new content that they can sell at a premium. But while their intentions may not be malicious, the effects are very significant.

As for availability, William Patry, author of *How to Fix Copyright* notes that of the Motown recordings, ninety-five percent are unavailable today.¹⁹⁸ Jason Schultz compiled research and found that only 2.3% (4,267) of the 187,280 books published in the US from 1927-1947 were available in 2002 from publishers at any price.¹⁹⁹ Similarly, 9.2% of films were available.²⁰⁰

A recent study by the Library of Congress demonstrates the industry has done an extremely poor job of preserving older films.²⁰¹ Of the nearly 11,000 silent feature films made from 1912 through 1929,²⁰² the survey found only about 3,311 are known to exist today and only 1,575 exist in their original 35 millimeter release format.²⁰³ The rest survive in foreign versions, are incomplete, or are in lower-quality formats.²⁰⁴ This means only about fourteen percent of silent era films survived in their original form, and even those may not be in good quality today.²⁰⁵ Our culture is literally falling apart because copyright is preventing us from keeping it for the ages.

This epidemic doesn't just affect films, it also affects our television history for which has historically been even less of an economic incentive of preserving (reselling aired television content is a relatively new monetization method for the industry, before that there was little known incentive for long term preservation of master tapes).²⁰⁶ For example, BBC is currently missing 97 of 800 *Doctor Who* episodes after the BBC had wiped its tapes.²⁰⁷ In fact, BBC was missing more episodes until in April 2009, while searching deep space for

¹⁹⁸ See PATRY, *supra* note 4, at 61 (“even though Motown Records is a very valuable music catalogue, 95 percent of its recordings are no longer available. Similar figures exist for other labels.”).

¹⁹⁹ *Id.* at 201.

²⁰⁰ Lindsay Warren Bowen, Jr., *Givings and the Next Copyright Deferment* 77 FORDHAM L. REV. 809, 832 (2008), available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4398&context=flr>.

²⁰¹ See ANNETTE MELVILLE & SCOTT SIMMON, LIBRARIAN OF CONG., FILM PRESERVATION 1993: A STUDY OF THE CURRENT OF AMERICAN FILM PRESERVATION 5 (1993), available at <http://www.loc.gov/film/study.html>.

²⁰² DAVID PIERCE, LIBRARY OF CONG., THE SURVIVAL OF AMERICAN SILENT FEATURE FILMS: 1912-1929 5-6 (2013), available at http://www.loc.gov/today/pr/2013/files/2013silent_films_rpt.pdf.

²⁰³ *Id.* at 21.

²⁰⁴ See MELVILLE & SIMMON, *supra* note 201.

²⁰⁵ PIERCE, *supra* note 202, at 21.

²⁰⁶ See Jacopo della Quercia, Chris Berglund & James Amaz, *7 Amazing Works of Pop Culture That Have been Lost Forever*, CRACKED (Sept. 16, 2014), <http://bit.ly/1uFCVRS> (listing “7 Amazing Works of Pop Culture That Have Been Lost Forever.”)

²⁰⁷ *Id.*

extra-terrestrial signals, scientists in Puerto Rico discovered old television broadcasts that “seemed to be originating from deep space.”²⁰⁸ Several weeks of broadcasts were recovered through this method, including lost episodes of Doctor Who.²⁰⁹

This is not the only example, it was also true of other classic shows like *Dad’s Army*²¹⁰ and *Z Cars*.²¹¹ Even Monty Python’s *Flying Circus* almost suffered this fate.²¹² According to Monty Python troupe member Terry Jones, “the shows were nearly wiped [erased] by the BBC.”²¹³ Jones says that in 1971 he got a call that the BBC was going to erase all of the original tapes to save money.²¹⁴ “That is what the BBC did in those days; they wanted the videotapes to reuse.”²¹⁵ According to the documentary, Gilliam came to the rescue, buying the run of ‘Python’ episodes before they could be erased.²¹⁶

Incredibly, “[u]ntil the 1970s the networks did not have a systemic policy to preserve programming other than prime time. So all other genres -- sports, talk, daytime, news -- were haphazardly recorded and archived.”²¹⁷ The first Super Bowl Sunday, January 15th, 1967, Green Bay Packers vs. Kansas City Chiefs, was watched by 27 million people,²¹⁸ however, while it was apparently originally recorded by the networks at some point “both networks either destroyed or recorded over their videotapes and for decades, Super Bowl I was missing and was considered one of the holy grails of missing television.”²¹⁹

But thirty eight years later, two reels of two-inch quadruplex were found of most of the game, missing the half-time show and a good portion of the third quarter as well as some of the commentary between plays.²²⁰ According to one estimate this tape was valued at over \$1 million.²²¹ As of 2011, even once the video was restored, no football fans had actually seen the recording of the

²⁰⁸ 47 year old television signals bouncing back to Earth, BBC NEWS (Apr. 1, 2009, 2:05), www.rimmell.com/bbc/news.htm.

²⁰⁹ *Id.*

²¹⁰ IMDB, <http://www.imdb.com/title/tt0062552/> (last visited Nov. 9, 2014).

²¹¹ *Id.*

²¹² Doug Ganley, *Monty Python Celebrates 40 years of silliness*, CNN (Oct. 21, 2009), <http://edition.cnn.com/2009/SHOWBIZ/TV/10/21/monty.python.40/index.html?iref=nextin>.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Ron Simon, *First Super Bowl Broadcast Found!*, PALEY CENTER FOR MEDIA (Feb. 7, 2011), <http://www.paleycenter.org/simon-first-super-bowl-broadcast-found>.

²¹⁸ David Roth & Jared Diamond, *Found at Last: A Tape of the First Super Bowl*, WALL ST. J. (Feb. 5, 2011, 12:01 AM), <http://on.wsj.com/1zcDfwj>.

²¹⁹ *How Most of Super Bowl I Was Recovered*, TELEVISION OBSCURITIES (Feb. 2, 2014, 2:30 PM), <http://www.tvobscurities.com/2014/02/how-most-of-super-bowl-i-was-recovered/>.

²²⁰ *Id.*

²²¹ Roth & Diamond, *supra* note 218.

game as the Paley Center, which restored the video, was not the owner of the copyright.²²² In fact, according to one article, even as of 2014, the NFL has asserted copyright to prevent anyone from viewing the restored footage of the original game.²²³

This issue has been such a systemic problem that the Paley Center, an organization dedicated to the discussion of the cultural, creative and social significance of television, radio and emerging platforms,²²⁴ keeps an active list of “lost” programs²²⁵ of major television programs they are looking for, the First Super Bowl was on this list until the damaged tape reel was discovered.

One under acknowledged aspect of this loss of accessible culture can be seen in access to older video games. Video games have, with only limited exceptions, never entered the public domain, because they have only existed in

²²² *How Most of Super Bowl I Was Recovered*, *supra* note 219.

²²³ *Id.*

²²⁴ *Television Programs We’re Looking For*, PALEY CENTER FOR MEDIA, <http://bit.ly/1GyMRIW> (last visited Nov. 10, 2014).

²²⁵ *Id.* (several examples removed). Their current list includes (emphasis added):

The Opening of the World’s Fair with David Sarnoff and Franklin D. Roosevelt
(April 20, 1939)

This event marked the beginning of regularly scheduled telecasting, yet little visual record remains of these experimental years through World War II, including the first network program (October 17, 1941), in which a Philadelphia station carried a program originating from New York.

News: 1946-55

Esso Newsreel (NBC); CBS Evening News (CBS); All-Star News (ABC); Camera Headings (DuMont); Camel News Caravan (NBC).

Coverage of the 1948 Presidential Election

Dewey or Truman? The election was covered by all networks; none of that coverage is known to exist.

Actor’s Studio

(1948-50)

We are searching for examples of this live anthology series that featured such students of the legendary acting school as Kim Hunter, Julie Harris, Jessica Tandy, Martin Balsam, and Marlon Brando.

NFL Championship Game: Los Angeles Rams vs. Cleveland Browns

(December 23, 1951)

The first network coverage of a National Football League championship game is missing. In fact, many of the most famous televised sporting events are lost, including Don Larsen’s perfect game in the 1956 World Series between the New York Yankees and the Brooklyn Dodgers, and the classic 1958 NFL championship between the New York Giants and the Baltimore Colts.

Open End

(1958-66)

Few episodes of this David Susskind series remain. We are particularly interested in: “The Young Giants” (February 1, 1959) with directors Fred Coe, John Frankenheimer, and Sidney Lumet; “Always Leave Them Laughing” (February 14, 1960) with writers Larry Gelbart, Mel Tolkin, and Mel Brooks; and “Television Tempest” (September 25, 1960) with Ernie Kovacs, Rod Serling, and Sheldon Leonard.

Id.

an era that has seen regular copyright extensions.²²⁶ But because video game generations move so quickly, one can easily see how older artistic works can quickly become completely unavailable to the general public – a far cry from the stated purpose of promoting the progress of the sciences when the general public can no longer access those materials in any form, sometimes for any price.

Since new consoles are released every four to six years,²²⁷ and most game consoles have limited or no backwards compatibility,²²⁸ older games become unavailable for the general public to buy commercially. Used versions of those games may be difficult to acquire and require the maintenance of an old game console that is no longer available for sale or supported for repairs. As a result, much of entire generations of video games are effectively impossible for the average person to enjoy, and therefore, for other video game creators to learn from or build upon. Arts are generally iterative, and perhaps this is even truer with video games, so the idea that generations of a broadly defined “art form” are disappearing, likely significantly stifles artistic creation.²²⁹

However, despite the ease of maintaining the availability of these materials, and seemingly financial interest to the copyright holder to do so, the evidence suggests that even Nintendo, with one of the best track records on this issue, fails to make most of their games available for purchase in any capacity.²³⁰ Zachary Knight produced a small sample study on game availability and found that Nintendo’s Virtual Console doesn’t even scratch the surface of the classic

²²⁶ See John Walker, *Editorial: Why Games Should Enter The Public Domain*, ROCK, PAPER, SHOTGUN (February 3, 2014, 1:00 PM), <http://www.rockpapershotgun.com/2014/02/03/editorial-why-games-should-enter-the-public-domain/>.

²²⁷ Shara Tibken, *Game Console Updates Will Come Fast Game Stop CEO Predicts*, CNET (Oct. 8, 2013, 8:36 AM), <http://cnet.co/13ITHHM>.

²²⁸ Andrea Peterson, *PlayStation 4 Can’t Play Old Games. But Backward Compatibility Was Just a Fad*, WASH. POST (Nov. 15, 2013), <http://wapo.st/1x56z7N>.

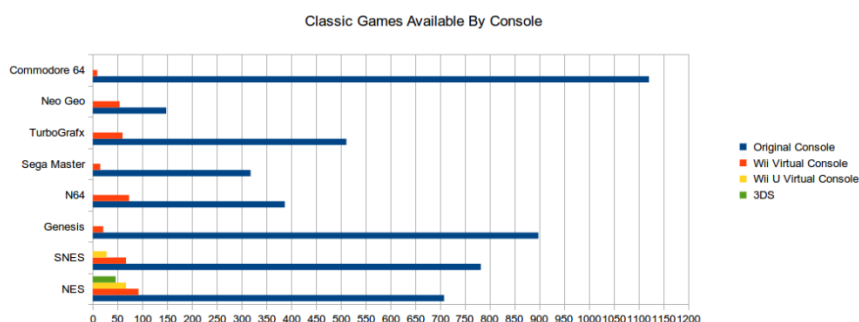
²²⁹ As previously stated in an article published by R street:

Many major game companies know that consumers loved their old games and try to provide some availability of their older games. Nintendo in particular is well known for their Virtual Console service where owners of Nintendo’s new consoles can buy versions of their older games and play them on the new console as digital downloads. From a technical perspective, the files are relatively minimal and the requirements for “emulation” are relatively easy for the console, so there is minimal impediment for Nintendo to bring back most of its games on the Virtual Console (those that it owns or can obtain permission to license).

R Street Policy Study No. 20, supra note 6, at 12.

²³⁰ See Zachary Knight, *Extended Copyrights in Games Means a Loss of Culture for Gamers*, RANDOM TOWER (Feb. 4, 2014, 1:03 PM), <http://randomtower.com/2014/02/extended-copyrights-in-games-means-a-loss-of-culture-for-gamers/>.

games:²³¹



While consumers often cannot legally access the vast majority of these older games, consumers are finding ways around legal restrictions through the use of emulators²³² to play essentially any older game illegally. These emulators are extremely popular to access games that cannot be legally played otherwise. The use of such software demonstrates a continued, and unmet, demand for these games.²³³ Very often those who use these emulators actually bought a copy of these games at one point for a previous console that they may no longer have or maintain.

An iPhone²³⁴ has more than enough space and capacity to emulate every game console of Nintendo that is no longer available (but is not authorized by Nintendo and often requires the phone be jailbroken).²³⁵ Online downloads for

²³¹ *R Street Policy Study No. 20*, *supra* note 6, at 12. Mr. Knight concluded:

The lack of a public domain for games is hurting the modern gamer by denying them classic games outside of costly and time consuming collecting. Considering the finite number of working cartridges and discs for those games, many gamers are out the ability to play them completely. How much better would it be for gamers if we didn't have such a dirth of games. Imagine if we pulled the ROM industry out of the shadows and brought it into the light and allowed those games to be freely and widely distributed. That is the power of the public domain. Instead of having fewer than 10% of games available through legal means, you will have closer to 100% of those games available.

Knight, *supra* note 230.

²³² *See id.*

²³³ *See id.*

²³⁴ Nelson Aguilar, *How to Play NES Game ROMS on Your iPad or iPhone – No Jailbreak Required*, WONDERHOWTO, ios.wonderhowto.com/how-to/play-nes-game-roms-your-ipad-iphone-no-jailbreak-required-0151062/ (last visited Sept. 27, 2014).

²³⁵ *Id.*; see Andrew Leong, Note, *Video Game Emulation and the Law*, 6 UCLA J. L. & TECH 12 (2002), available at http://www.lawtechjournal.com/notes/2002/12_020819_leung.php.

“every NES game,” the original Nintendo console, includes 13,337 games at a total size of around 250 MB (small enough to fit a smartphone).²³⁶ The existence of this gray market of emulators to play older consoles that can’t be bought new and download games that are no longer being sold, demonstrates that if copyright were to expire on video games, then the mainstream availability of those materials that are no longer being sold would likely expand exponentially.

Many older PC games have developed a cult following of generations who continue to play those games long after they are being commercially sold, long after the operating systems they were written for are in use, and long after the company even supports game play online.²³⁷ While PC’s don’t have the problem that consoles have with an entirely new console being sold every six years or so with minimal or no backwards capability, PC gaming has its own technological difficulties. New Microsoft operating systems may have minimal or no support for playing games made for Windows 95, or for DOS (and certainly not older Macintosh operating systems).²³⁸ Sometimes there are hardware issues in playing older games with modern 64-bit processors having difficulty playing games made for eight, sixteen or thirty-two bit processors.²³⁹ There are also potential graphics cards issues in displaying such older games on modern monitors with high resolution.²⁴⁰ But most importantly, there are often problems of online play for older PC games,²⁴¹ which is the main allure for some games and the staying power of the video game itself. All of these problems could be dealt with quite easily if the game creators wanted to make their games accessible for modern audiences, or if game creators’ copyrights were to expire and demand was sufficiently strong.

One of the most successful PC game franchises was the Command & Conquer series by Westwood, which is listed as one of the top selling PC franchises in history having sold over 15 million copies.²⁴² Later Command & Conquer games developed a strong following of online play – it’s one of the

²³⁶ See, e.g., *NES Nintendo Games Collection*, KICKASS TORRENTS (Jan. 8, 2013), <http://bit.ly/13lc1Wh>.

²³⁷ See generally Leif Johnson, *Why PC Gaming is Surging*, IGN (Sept. 4, 2013), <http://bit.ly/1sOSJot>.

²³⁸ See Chris Hoffman, *How to Run Old Games & Software in Windows 8*, MAKE USE OF (Aug. 5, 2014), <http://bit.ly/1DRzVd0>.

²³⁹ See *id.*

²⁴⁰ See Matt Smith, *Gaming Like It’s 1999: Building a Legacy Windows Gaming PC*, PC PERSPECTIVE (Jul. 20, 2012), <http://www.pcper.com/reviews/Editorial/Gaming-Its-1999-Building-Legacy-Windows-Gaming-PC>.

²⁴¹ See *Basic Computer Game Trouble Shooting*, COMPUTER HOPE, <http://www.computerhope.com/issues/chgame.htm> (last visited Sept. 9, 2014).

²⁴² See Peder Larson, *Command and Conquer*, STANFORD, 2 (Mar. 18, 2002), http://web.stanford.edu/group/htgg/sts145papers/plarson_2002_1.pdf.

first PC games with online play features, designed to work on dial up connections.²⁴³ Electronic Arts no longer sells the games individually, but it does sell these games as part of a collection of all Command & Conquer games – however, it no longer supports online play.²⁴⁴ This is problematic because one of the main draws of the Command & Conquer franchise was to play online, and with modern Ethernet connections being much faster than in the 1990's, such a game could only improve with modern technology and a thriving user generated universe. Older games, like Command & Conquer, focused on online play for a variety of reasons, including that the artificial intelligence for computers was difficult to program.²⁴⁵ So if you wanted a real adversary in the game, you needed to play online against another person. Essentially for a modern audience, to fully enjoy Command & Conquer, you have to play it online as today's artificial intelligence is very antiquated -- but unfortunately this is almost impossible and current copyright terms are part of the reason.

Today, Electronic Arts no longer supports the game, so in order for customers to play the game online, they have to rely on servers operated by a Swiss company that effectively no longer works.²⁴⁶ Effective online play for these games is rendered impossible: creating new usernames no longer works, games frequently crash online, etc.²⁴⁷ There are millions of people who enjoyed these games and would like to play them online — and some who would even pay money to play them online as they were intended²⁴⁸ – but because Electronic Arts no longer supports the series, that is functionally impossible.

If the Founders' copyright term were in effect today, with copyright expanded, originally just books, maps and charts, to now include video games, Electronic Arts' original fourteen-year copyright would have expired for most of these games, or would soon expire, unless Electronic Arts chose to renew its copyright for another fourteen years and opted to pay to do so. Because Electronic Arts no longer supports these games, it's highly likely that they would have chosen to let the copyright expire.

If the copyright on these games expired, far from Jack Valenti's fear that the public domain is a barren wasteland, these popular games could be repurposed and updated for modern operating systems, or remade as an online Facebook

²⁴³ See *id* at 7.

²⁴⁴ See Alana Logan et al., *EA Celebrates 17 Years of Strategy Gaming with Command & Conquer the Ultimate Collection*, EA (Aug. 31, 2012), <http://investor.ea.com/releasedetail.cfm?ReleaseID=703743>; see also Tom Phillips, *50 EA Games Will Have Their Servers Shut Down*, EUROGAMER (May 12, 2014), <http://bit.ly/1mRKW1c>.

²⁴⁵ See Zak Middleton, *Case History: The Evolution of Artificial Intelligence in Computer Games*, STANFORD 2 (Mar. 18, 2002), <http://stanford.io/1wKQdPD>.

²⁴⁶ See Phillips, *supra* note 244.

²⁴⁷ See *id*.

²⁴⁸ See *id*.

game. Millions of new people could enjoy these incredible games that created an entire genre of video games: real time strategy games. Some of those may be inspired to create their own real time strategy game, because casual online video gaming that can be played in browser is a newer type of medium and Command & Conquer styled games are well suited for that modern medium. While repurposing these games would require some work for free, if an open-source community can build an entire operating system and web browser for free and regularly maintain and update it, and if such a community can build the world's largest encyclopedia, then an online community can repurpose older games for a modern audience. This is even more predictable when one analyzes the explosion of user-generated content within games such as user created maps and user generated modified games.²⁴⁹ Electronic Arts would likely benefit financially from Command & Conquer's legacy games going open-source because it has tried to create new Command & Conquer games but has had a variety of problems, stemming in part because newer generations are unfamiliar with the brand.²⁵⁰ New generations are losing this aspect of our culture, and at an alarming rate.

Examining how copyright terms affect availability of older video games has received almost no scrutiny in academic literature, and while it's a newer medium of expression, if it is covered under copyright, then scholars must scrutinize how copyright best "promote[s] the [p]rogress of [the] [s]cience[s]."²⁵¹ Top video games today cost as much or more than top movie production – the most expensive video game, Grand Theft Auto V from 2013, cost \$265 million to produce and market²⁵² which is comparable with the production costs, though not including the marketing, for the most expensive movie made in history "Pirates of the Caribbean - At Worlds End" which estimated at \$400 million.²⁵³ Video games generate profits that can surpass the top films, for example, Grand Theft Auto V earned US \$800 million in its first day and US \$1

²⁴⁹ For example Valve's "Half-Life" game was modified by Minh "Gooseman" Le and Jess "Cliffe" in 1999 to create "Counter-Strike" which would become one of the most popular games of all time (Valve would eventually buy out their intellectual property and re-release a Counter-Strike series). See *Counter-Strike*, FROM PACMAN TO POOL, <http://mediaindustries1.wordpress.com/valve-and-counter-strike/counter-strike/> (last visited Dec. 13, 2014).

²⁵⁰ See Paul Younger, *New Command & Conquer Won't Happen Anytime Soon*, INC GAMERS (Oct. 31, 2013), <http://www.incgamers.com/2013/10/new-command-conquer-wont-happen-any-time-soon>.

²⁵¹ U.S. CONST. art. I § 8.

²⁵² Luke Villapaz, 'GTA 5' Costs \$265 Million to Develop and Market, Making it the Most Expensive Video Game Ever Produced: Report, INT'L BUS. TIMES (Sept. 8, 2013, 3:36 PM), <http://www.ibtimes.com/gta-5-costs-265-million-develop-market-making-it-most-expensive-video-game-ever-produced-report>.

²⁵³ Kirsten Acuna, *The 30 Most Expensive Movies Ever Made*, BUS. INSIDER (June 18, 2014, 11:52 AM), <http://www.businessinsider.com/most-expensive-movies-2014-6?op=1>.

billion in its first three days making it the largest entertainment launch in history.²⁵⁴ Therefore, if nothing else for the economic size of the video game market, video games are a medium that should not be ignored. In fact, there should be much more scrutiny and analysis of copyright term lengths impact on video games because they are a very unique medium, so the rules that apply to books, maps and charts may need to be adjusted for video games – the assumptions that policy makers make on copyright may not hold true.²⁵⁵

The original copyright terms of the 1790 Copyright Act applied only to books, maps and charts;²⁵⁶ these are mediums that were arguably “evolving,” as defined as building upon previous works, at a vastly different rate than video games. Furthermore, books, maps and charts have more of a timeless value. Good books, well researched maps and charts, will be of use for years ensuring a financial incentive for the publisher to keep them available while restricting others from publishing those works through copyright. But with video games, many game owners are not selling older games that they hold the rights too, while copyright is restricting anyone else from doing so, effectively removing culture from our society. Such a removal of culture from our society was not what the Founders intended with provisions to “promote the [p]rogress of the [s]cience[s].”²⁵⁷

One can argue that long copyright terms are predicated under an implied assumption that many older materials, no longer actively being promoted, generally exist somewhere, so if someone really wanted to access those materials it is possible for them to find them on Ebay, a library or a used book store. Now in practice this does not always happen,²⁵⁸ or these rare works become extremely expensive (with the revenue not going to the content creator but to the holder of the work) but it’s an assumption that books and movies with some reader-

²⁵⁴ Erik Kain, ‘*Grand Theft Auto V*’ Crosses \$1B In Sales, Biggest Entertainment Launch In History, FORBES (Sept. 20, 2013, 1:22 PM), <http://onforb.es/1vhHvVp>.

²⁵⁵ Further modern copyright laws like the Digital Millennium Copyright Act (DMCA) have had a particular impact upon the video game industry, pushing video game consoles to become fully digital. Before the DMCA it was lawful for companies to reverse engineer modern video game consoles and release their own video games for those consoles without paying the license fee to Nintendo, Sega or Artari. A lot more tinkering was allowed and flourished. But the DMCA effectively mandated the current closed video game market where every game must be licensed by the console maker etc. This change may be beneficial or it may have had a negative effect for video game creation—certainly it likely harmed the potential for user generated games and it gave the console manufacturers much more leverage in demanding whatever licensing costs they would like. Thus copyright as applied to video games is much more complex than other mediums.

²⁵⁶ See *R Street Policy Study No. 20*, *supra* note 6, at 23.

²⁵⁷ See *Feist Publications Inc., v. Rural Telephone Service Co.*, 499 U.S. 340, 349 (1991) (quoting U.S. CONST. art. I § 8).

²⁵⁸ For example, of the 187,280 books published between 1927-1946, only 2.3% were still in print in 2002. PATRY, *supra* note 4, at 201.

ship are still generally accessible somehow. But with video games, this simply may not be the case.

100 plus years from now, an average person would be unlikely to be able to procure a working Nintendo 64 and play Nintendo 64 games legally. This is not an exaggeration, as copyright terms are so long today that the physical technology to play the copyrighted works will have disintegrated before it expires. Furthermore, other copyright laws like the DMCA may make it illegal to make an unauthorized version of any digital video game console. That physical medium, Nintendo 64, is highly unlikely to survive in working condition that long, even if well taken care of. One can argue that for games that retain commercial value there may still be an incentive for the rights holder to make them available, but as can be shown through the popularity of emulators to play older games and Knight's study of Nintendo's virtual console games, this market demand is simply not met.²⁵⁹

Copyright is designed to promote the progress of the sciences and useful arts through a temporary monopoly, for a small exclusivity window to provide a large incentive for content creation. If this "limited times" is so long that the medium is no longer accessible after the expiration of monopoly, then it's not enabling a public domain at all. If Nintendo is only going to sell Nintendo 64 games for 6 years, and not even support the hardware after 10 years, do the original assumptions about copyright terms in other mediums make any sense as applied here? Do we want the force of law to prevent anyone from accessing video games that the producer has long forgotten about?

G. Stifling Content Creation

If we continue to subsidize rent-seeking by the heirs of existing copyright holders, rather than consider the interests of new content creators who need a shorter copyright term, we will stifle content creation. A number of orchestras, for example, have stopped performing *Peter and the Wolf*, by Prokofiev, since when the work returned to copyright protection after having been in the public domain, the cost of sheet music became prohibitive.²⁶⁰ A survey by the Conductors Guild found that eighty-three percent of orchestral conductors have a general practice of conserving resources by limiting their performances and recordings of copyrighted works.²⁶¹ About seventy percent said they are "no

²⁵⁹ This can be contrasted with record players. While the medium was largely non-used, record players have remained available to purchase new and recently most people are buying record players once again. Only Nintendo can sell Nintendo 64's and they have stopped doing so.

²⁶⁰ *R Street Policy Study No. 20*, *supra* note 6, at 13.

²⁶¹ Brief of the Conductors Guild and the Music Library Association as Amici Curiae Supporting Petitioners at 7 *Golan v. Holder*, 132 S.Ct. 873 (2011) (No. 10-545).

longer able to perform some works previously in the public domain ... because those works are now under copyright protection.”²⁶²

Many times, “remixing” of work from the public domain happens so subtly that the general public is completely unaware of the repackaging of previous ideas. Anyone who has watched DreamWorks’ “Shrek” series may have noticed that the character Puss in Boots – a cat who stands on his hind legs wearing shoes, bandana and a hat, while wielding a sword and exchanging witty banter – is based, however loosely, upon a 1729 French fairy tale by Charles Perrault.²⁶³

H. A Vibrant Public Domain Benefits Society

Sometimes, the repackaging of older works includes not just a character, but an entire storyline. The Motion Picture Patents Company, the organization that dominated the early American film market, built much of its business on producing adaptations of books and plays in the public domain such as stories from the Bible, fairy tales and Shakespeare’s plays.²⁶⁴ Most of the Grimms’ fairy tales were first published in 1812, with the last edition produced in 1857.²⁶⁵ More than 100 years later, when the Grimms’ work²⁶⁶ was no longer copyrighted, they still had utility for modern culture. “Disney’s recent 2013 film *Frozen* was based upon an 1845 fairy tale by Hans Christian Anderson, entitled *The Snow Queen*.²⁶⁷ *Sleeping Beauty* from 1959 was based upon a 262-

²⁶² *Id.* Professor Peter Decherney, who is a Professor of Cinema Studies at the University of Pennsylvania, in an op-ed in the *New York Times* entitled *Will Copyright Stifle Hollywood* explains the impact of copyright extension and removing works that were in the public domain back under copyright [in 1994 under the Uruguay Round Agreements Act]:

In my own field — film — the effects of the 1994 law have been palpable. Distributors of classic foreign films have seen their catalogs diminished. Students can no longer get copies of many films. Archivists have postponed the preservation of important films. And of course filmmakers have lost access to works of literature that they might have adapted and music that might have enhanced soundtracks...[m]ore important, for Hollywood and every other American cultural industry, access to a stable and growing public domain has been essential to innovation. Unfortunately, even representatives of the American film industry don’t always recognize this truth...[t]he M.P.A.A. contends that the expansion of copyright is good for its industry. . . [b]ut history tells a different story. Filmmakers have consistently used public domain works to anchor artistic and technological innovation.

Peter Decherney, *Will Copyright Stifle Hollywood*, N.Y. TIMES, Oct. 5, 2011, at A27.

²⁶³ See CHARLES PERRAULT, THE MASTER CAR; OR, PUSS IN BOOTS (1697), available at <http://www.pitt.edu/~dash/perrault04.html>.

²⁶⁴ PETER DECHERNEY, HOLLYWOOD’S COPYRIGHT WARS: FROM EDISON TO THE INTERNET 13 (John Belton ed., 2012).

²⁶⁵ Adam Gidwitz, *The Twisted History of Snow White*, INT’L READING ASS’N (Oct. 24, 2013), <http://bit.ly/1wKQAd5>.

²⁶⁶ *Id.*

²⁶⁷ Derek Khanna, *Unconstitutionally Long Copyright Terms Stifle Content Creation*,

year-old folk tale published by Charles Perrault in 1697.²⁶⁸

Snow White from 1937 was based upon the Brothers Grimm folk tale from 1812, and when Walt Disney was asked about that film he explained that “[he] picked that story because ‘it was well known and I knew we could do something with seven ‘screwy’ dwarfs....’”²⁶⁹ It was well known because three previous versions of *Snow White* had already been created by 1937, a direct result of it being in the public domain, and Disney himself remembered having seen work performed before while growing up in Kansas City.²⁷⁰

Under the current extremist copyright regime, as lobbied for by the content industry and enabled by Congress, there would never be another Disney Corp., whose success has been highly dependent on derivative characters and stories plucked from the public domain. Here is a short list of works created by Disney with story-lines mostly or entirely based upon works in the public domain (including the domestic box office revenues from the film, if available, but not including the often larger global revenues and other ancillary forms of lucrative merchandising and monetization):

Table 1: Major Disney films based on public domain works²⁷¹

Film	Year	Source	Year	Adjusted Domestic Gross	AllTime Rank

Just Ask Disney, THE HUFFINGTON POST (May. 5, 2014), <http://huff.to/Qemdcv>; see also Drew Taylor, *Trapped In Ice: Inside The 70-year Journey Frozen Took To Get To The Big Screen*, SNN (Nov. 26, 2013), <http://bit.ly/1x57Yv3>.

²⁶⁸ Khanna, *supra* note 267.

²⁶⁹ WALT DISNEY: A TRIUMPH OF AMERICAN IMAGINATION 216 (2006).

²⁷⁰ Brief of Peter Decherney as Amicus Curiae in Support of Petitioners at 16-17 Golan v. Holder, 132 S.Ct. 873 (2012) (No. 10-545).

²⁷¹ Derek Khanna, *50 Disney Movies Based on the Public Domain*, FORBES (Feb. 3, 2014, 10:12 AM); Other films in the Disney vault include ones based on the Arthurian legends; Greek myths; Aesop’s fables; English folk tales of Robin Hood; the Chinese legend of Hua Mulan; Plato’s legend of Atlantis; Charles Perrault’s “Cinderella” (1697); Daniel Defoe’s “Robinson Crusoe” (1719); Johann Goethe’s “The Sorcerers’ Apprentice” (1797); the life of Pocahontas; the Brothers Grimm’s “The Frog Prince” and “Rapunzel” (1812); Sir Walter Scott’s “Rob Roy” (1817); Washington Irving’s “The Legend of Sleepy Hollow” (1820); Victor Hugo’s “The Hunchback of Notre Dame” (1831); Hans Christian Anderson’s “The Little Mermaid” (1837); Charles Dickens’ “Oliver Twist” (1839) and “A Christmas Carol” (1843); Alexandre Dumas’ “The Three Musketeers” (1844); Jules Verne’s “In Search of the Castaways” (1868), “20,000 Leagues Under the Sea” (1870) and “Around the World in 80 Days” (1873); Robert Louis Stevenson’s “Treasure Island” (1883) and “Kidnapped” (1886); Kenneth Grahame’s “The Reluctant Dragon” (1898) and “The Wind in the Willows” (1908); Jack London’s “White Fang” (1906); and Edgar Rice Burroughs’ “Tarzan of the Apes” (1914) and “A Princess of Mars” (1917). See Eddy Lednick, *Disney’s 54 Classic Animated Vault Films*, IMDB, <http://www.imdb.com/list/ls003947956/> (last visited Sept. 8, 2014).

				(\$M)	
Snow White and the Seven Dwarves	1937	Brothers Grimm folk tale	1812	910.2	10
Fantasia	1940	Bach, Tchaikovsky, Beethoven and other classical compositions	Various	693.4	22
The Jungle Book	1967	Novel by Rudyard Kipling	1894	615.2	30
Sleeping Beauty	1959	Charles Perrault folk tale/ Tchaikovsky ballet	1697/1890	606.8	31
Pinocchio	1940	Novel by Carlo Collodi	1883	562.8	39
Swiss Family Robinson	1960	Novel by Johann David Wyss	1812	449.3	83
Aladdin	1992	“One Thousand and One Nights”	1706	437.9	89
Frozen	2013	Hans Christian Anderson’s “Ice Queen”	1845	384.6	115
Beauty and the Beast	1991	G-S Barbot de Ville-neuve’s book	1775	378.8	121
Alice in Wonderland	2010	Lewis Carroll’s book	1865	351.0	147

Inflation-adjusted domestic gross box office figures courtesy of boxofficemojo.com

This partial list demonstrates how one company, Disney, has been enormously successful repackaging older story-lines from the public domain. Incredibly, while Disney was making its first feature film of *Snow White*, based on the public domain, they were considering making a feature film of *Alice in Wonderland*, but Disney “put the project on hold” because he believed that rights to *Alice in Wonderland* were not in the public domain.²⁷² Disney was “so committed to using public domain works that he was willing to wait until all of the rights were clearly lapsed, and he finally released his version of *Alice* in 1951.”²⁷³

The Disney Corporation, of course, added their own secret sauce, but the data shows that even 262-year-old story-lines easily can be translated to the mod-

²⁷² Brief of Peter Decherney as Amicus Curiae in Support of Petitioners at 16-17 *Golan v. Holder*, 132 S.Ct. 873 (2012) (No. 10-545).

²⁷³ *Id.* at 17-18.

ern world. In fact, not only are the characters and stories based on the public domain, but in some cases, so is much of the music.²⁷⁴ Furthermore, the original Mickey Mouse short film, “Steamboat Willie,” was itself a parody of Buster Keaton’s “Steamboat Bill Jr.”²⁷⁵ A parody is a form of fair use that builds upon the works of others.

Under current policy, there will never be another Disney. While Disney took and reused from the public domain, none of the works created by Disney are in the public domain for others to build upon.²⁷⁶ If current policy is extended, they never will. As Harvard Law Professor Lawrence Lessig has remarked, the Sonny Bono Copyright Extension Act ensures that “no one can do to Disney as Disney did to the Brothers Grimm.”²⁷⁷

The content industry has essentially argued that copyright represents their natural right to property, a perspective vastly disconnected with the evidence from our founding era.²⁷⁸ Under the content industry’s logic, reusing others’ works without paying royalties or licensing is always stealing and they have pushed for more and more restrictions upon doctrines like fair use.²⁷⁹

If, in the vernacular of the content industry, taking other people’s work without paying for it is always stealing, then the Disney Corp. is responsible for one of the greatest thefts in world history. Hollywood has “derived more profit from reusing public domain works than any other industry in history,” yet lobbies for policies to ensure their works never enter the public domain.²⁸⁰

²⁷⁴ *Boosey & Hawkes Music Publishers v. Walt Disney Co.*, 145 F.3d 481, 484 (2nd Cir. 1998).

²⁷⁵ LESSIG, *supra* note 13, at 24.

²⁷⁶ Michael De Groote, *Mickey Mouse Copyright Laws May Last Forever*, DESERET NEWS NAT’L (Nov. 1, 2013), <http://national.deseretnews.com/article/544/mickey-mouse-copyright-laws-may-last-forever.html>.

²⁷⁷ Steven Levy, *Lawrence Lessig’s Supreme Showdown*, WIRED MAG., http://archive.wired.com/wired/archive/10.10/lessig_pr.html.

²⁷⁸ See generally Derek Slater, *An Interview with Jack Valenti, A COPYFIGHTER’S MUSINGS* (Feb. 3, 2003), http://cmusings.blogspot.com/2003_02_02_cmusings_archive.html#88495460.

²⁷⁹ *Id.* Rep. Marsha Blackburn, R-Tenn. – one of the content industry’s most ardent supporters in Congress – has even ridiculed the concept of fair use itself:

I find it is like when you say you cannot be a little bit pregnant, so how do you go snip just a little bit of what somebody has created and where do you draw that line? It is like when my children were little, I would say, they would say something and it would be just a little white lie but little white lies lead to great big lies. And I think we have to begin to look at this issue not as just piracy, not as just snippets, but we have to look at it as theft.

Fair Use: Its Effects on Consumers and Industry, Before the Subcomm. On Commerce, Trade, and Consumer Protection of the Comm. On Energy and Commerce, 109th Cong. (2005) (Statement of Rep. Marsha Blackburn).

²⁸⁰ Brief of Peter Decherney as Amicus Curiae in Support of Petitioners at 7 *Golan v. Holder*, 132 S.Ct. 873 (2012) (No. 10-545).

I. The Need for a Vibrant Public Domain of More Recent Works

According to a study by the Copyright Office, under the law that existed until 1978, as much as eighty-five percent of all works under copyright in 1984 would have entered the public domain on January 1, 2013.²⁸¹ For content creators who didn't think it was worth renewing those copyrights, those works, books, music and movies would be available to use and repurpose for free and without permission. Ninth Circuit Appellate Court Judge Alex Kozinski has recognized that "[c]reativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: [c]ulture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative force it's supposed to nurture."²⁸²

The shrinking and limitation on the future public domain is a big deal because, as Professor Peter Decherney notes in his amicus brief that:

[a] stable public domain has been, and remains, the most dependable tool in Hollywood's arsenal of risk-mitigating and stabilizing measures. Public domain works are time-tested; they have name recognition; and they come with build-in audiences. . . . Today's independent producers can no longer expect new works to enter the public domain any time soon. They also have a smaller pool of public domain works to draw from than their predecessors.²⁸³

What if the works of Mozart, Dickens and Shakespeare were all under copyright and privately held? Has the public not been better served by having these works available for free to learn from and build upon? Would our generation and future generations not be better off with the older works of Disney available to build upon for free? That's what the founders thought.²⁸⁴ But under mod-

²⁸¹ *What Could Have Entered the Public Domain on January 1, 2013?*, CENTER FOR THE STUDY OF THE PUB. DOMAIN, <http://web.law.duke.edu/cspd/publicdomainday/2013/pre-1976> (last visited Sept. 8, 2014).

²⁸² *White v. Samsung Electronics of Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting). Judge Kozinski added that these "rights aren't free: [t]hey're imposed at the expense of future creators and of the public at large." *Id.* at 1516 (Kozinski, J., dissenting). He observed that the law "is full of careful balances between what's set aside for the owner and what's left in the public domain for the rest of us." *Id.* (Kozinski, J., dissenting). These balances "let the public use something created by someone else. But all are necessary to maintain a free environment in which creative genius can flourish." *Id.* (Kozinski, J., dissenting).

²⁸³ Brief of Peter Decherney as Amicus Curiae in Support of Petitioners at 6-7, 19 *Golan v. Holder*, 132 S.Ct. 873 (2012) (No. 10-545).

²⁸⁴ Thomas Jefferson was much more skeptical of copyright and patents than James Madison and the Founders rejected his suggestions such as specifically listing a specific term length in the Constitution itself. Jefferson's work should be read skeptically to ascertain the original public meaning of the copyright clause since the Founder's disagreed with his conclusions; however, Jefferson's perspective on the costs of copyright and patents, and the novelty of providing statutory property rights is enlightening. *See* Thomas Jefferson to Isaac McPherson, *supra* note 29

ern law, the masterpieces of our era, and generations of recent past, may never be available to build upon.

V. FINDING THE OPTIMAL LENGTH OF COPYRIGHT TERMS

On February 5, 1841, Thomas Macaulay gave a speech on copyright to the House of Commons, and presented a number of arguments concerning the danger of copyright maximalism.²⁸⁵

Macaulay's comparison of copyright with the East India Company's monopoly on tea and Lord Essex's monopoly on sweet wines is the same as Adam Smith's comparison with merchants establishing a new trade route in a dangerous region.²⁸⁶

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. . . . [t]hat ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody.

Id.

²⁸⁵ *Macaulay on Copyright*, THE PUB. DOMAIN, <http://www.thepublicdomain.org/2014/07/24/macaulay-on-copyright/> (last visited Sept. 27, 2014) (referencing Thomas Babington Macaulay's First Speech to the House of Commons on Copyright).

Sir, that I may safely take it for granted that the effect of monopoly generally is to make articles scarce, to make them dear, and to make them bad. And I may with equal safety challenge my honorable friend to find out any distinction between copyright and other privileges of the same kind; any reason why a monopoly of books should produce an effect directly the reverse of that which was produced by the East India Company's monopoly of tea, or by Lord Essex's monopoly of sweet wines. . . . It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly.

Id.

²⁸⁶ See SMITH, *supra* note 9

When a company of merchants undertake, at their own risk and expense, to establish a new trade with some remote and barbarous nation, it may not be unreasonable to incorporate them into a joint stock company, and to grant them, in case of their success, a monopoly of the trade for a certain number of years. It is the easiest and most natural way in which the state can recompense them for hazarding a dangerous and expensive experiment, of which the public is afterwards to reap the benefit. A temporary monopoly of this kind may be vindicated upon the same principles upon which a like monopoly of a new machine is granted to its inventor, and that of a new book to its author. But upon the expiration of the term, the monopoly ought certainly to determine; the forts

Here Macaulay not only uses the terminology of Madison, but he makes a similar argument. Madison argued that:

[G]rants of this sort [monopolies] can be justified in very peculiar cases only, if at all, the danger being very great that the good resulting from the operation of the monopoly, will be overbalanced by the evil effect of the precedent, and it being not impossible that the monopoly itself, in its original operation, may produce more evil than good.²⁸⁷

But like James Madison, Macaulay also argues that the good of copyright is such that we must accept some evil.²⁸⁸ Macaulay, however, expands from our knowledge of Madison's opinion to provide one way to assess the proper balance "the evil ought not to last a day longer than is necessary for the purpose of securing the good."²⁸⁹

Macaulay goes on to argue that the longer copyright terms are, the more the harm must be balanced out by some benefit.²⁹⁰

A monopoly of sixty years produces twice as much evil as a monopoly of thirty years, and thrice as much evil as a monopoly of twenty years. But it is by no means the fact that a posthumous monopoly of sixty years gives to an author thrice as much pleasure and thrice as strong a motive as a posthumous monopoly of twenty years. On the contrary, the difference is so small as to be hardly perceptible.²⁹¹

One can disagree that copyright should not "last a day longer than is necessary for the purpose of securing the good,"²⁹² but it does provide a useful way to think about the subject. Furthermore, copyright can incentivize more than the original writing of the work, and it's important for policy-makers to be confident of what the good is that needs to be secured through copyright: is the good writing a book, publishing a book, investing in public relations around a book, converting that book into a movie, investing in technology to remake that movie or update the movie for 3D.

But, unlike in Macaulay's day, today we have a significant amount of data on the optimal term length of copyright. Therefore, policy-makers can take an honest approach: what does the data show on how the Founders copyright is insufficient or invalid for the modern economy and how can it be extended or

and garrisons, if it was found necessary to establish any, to be taken into the hands of government, their value to be paid to the company, and the trade to be laid open to all the subjects of the state. By a perpetual monopoly, all the other subjects of the state are taxed very absurdly in two different ways: first, by the high price of goods, which, in the case of a free trade, they could buy much cheaper; and, secondly, by their total exclusion from a branch of business which it might be both convenient and profitable for many of them to carry on.

Id.

²⁸⁷ Madison, *supra* note 27.

²⁸⁸ Macaulay on Copyright, *supra* note 285.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

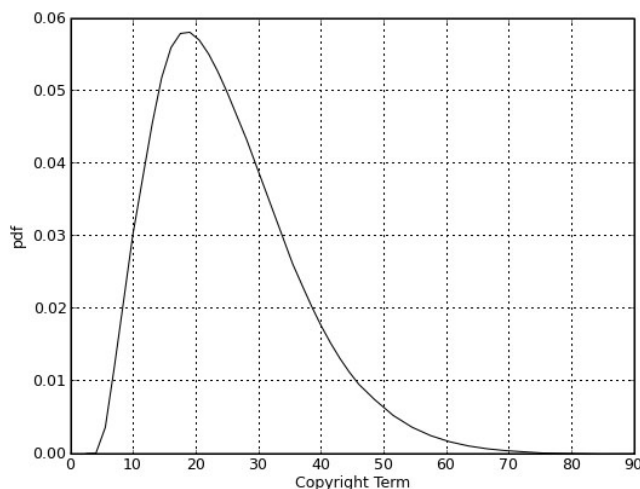
²⁹¹ *Id.* (referencing Thomas Babington Macaulay's First Speech to the House of Commons on Copyright).

²⁹² *Id.*

improved for modern content and dissemination. This question, what does the data say, is how Congress approached the issue of copyright term length before, as the 1909 report already cited from the Senate Committee on Patents (S. 9440) stated that “Congress must consider...two questions: [f]irst, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public.”²⁹³ Congress must use copyright to confer “a benefit upon the public that outweighs the evils of the temporary monopoly.”²⁹⁴

There have been several studies on optimal copyright term length, and all have concluded that our current term lengths are counter-productive.²⁹⁵ Even the Congressional Research Service concluded the added incentive to create new works provided by a twenty-year extension to the term of copyright was small compared to existing incentives.²⁹⁶ A study from Cambridge University found the optimal copyright term is around fifteen years and found with ninety-five percent certainty that the optimal term of copyright should be less than thirty years.²⁹⁷

Figure 3: Optimal length of copyright terms²⁹⁸



²⁹³ COMM. ON PATENTS, TO AMEND AND CONSOLIDATE ACTS RESPECTING COPYRIGHT, H.R. REP. NO. 2222, at 7 (1909).

²⁹⁴ *Id.*

²⁹⁵ *R Street Policy Study No. 20*, *supra* note 6, at 20-21.

²⁹⁶ EDWARD RAPPAPORT, CONG. RESEARCH SERV., COPYRIGHT TERM EXTENSION: ESTIMATING THE ECONOMIC VALUES 4 (1998).

²⁹⁷ POLLOCK, *supra* note 3, at 22.

²⁹⁸ *Id.*

Current copyright terms are so long that they are literally off the chart, many standard deviations beyond optimal terms.

In 1999, as part of the *Eldred* case, Hal R. Varian, then-dean of the School of Information Management and Systems at the University of California at Berkeley, submitted an affidavit on the economic incentives of longer copyright terms, finding an insignificant difference on the incentives to produce between a “life plus seventy” term and a “life plus fifty” term.²⁹⁹

In 2003, the *Economist* magazine ran an editorial arguing for a fourteen-year copyright term, noting that “[c]opyright was originally the grant of a temporary government-supported monopoly on copying a work, not a property right...[s]tarting from scratch today, no rational, disinterested lawmaker would agree to copyrights that extend to seventy years after an author’s death, now the norm in the developed world.”³⁰⁰

In 2009, Professors Ivan Png and Qiu-hong Wang analyzed the production of films, books and movies in nineteen OECD countries that, at various points between 1991 and 2005, had extended the statutory terms of copyright.³⁰¹ Their research demonstrated no evidence that the longer terms of copyright caused the creation of more works.³⁰² Given that we know the harm of longer terms, if there is no evidence of benefit, this is extremely significant.

In 2010, a group of leading experts on copyright law and policy released a report on reforms to U.S. copyright law.³⁰³ Their report, *The Copyright Principles Project: Directions for Reform*, includes many well-received proposals for reforming the copyright system, and the leader of this project testified with this report before Congress in 2013 to present the findings.³⁰⁴

²⁹⁹ Affidavit of Hal R. Varian at 1,4 *Eldred, et al. v. Reno*, 74 F.Supp.2d 1 (D.D.C. 1999).

³⁰⁰ *Copyrights: A radical rethink*, THE ECONOMIST (Jan. 23, 2003), <http://www.economist.com/node/1547223>.

³⁰¹ See L.P.L. Png & Qiu-hong Wang, *Copyright Law and the Supply of Creative Work: Evidence from the Movies*, SERCI 3 (Mar. 2009), <http://www.serci.org/2009/png.pdf>.

³⁰² See *id.*

³⁰³ See Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1176 (2010) (“The goal of the [Copyright Principles Project] CPP was to explore whether it was possible to reach some consensus about how current copyright law could be improved and how the law’s current problems could be mitigated.”).

³⁰⁴ See Terry Hart, *Copyright Principles Project: Increasing the US Copyright Office’s Role*, COPYHYPE (Nov. 1, 2010), <http://bit.ly/16zxP2o> (“Working together they crafted twenty-five specific proposals...[r]eaction to the report from the Copyright Principles Project has been generally positive.”); *Hearing on A Case Study in Consensus Building: The Copyright Principles Project Before the H. SubComm. on Courts, Intellectual Property and the Internet, Comm. on Judiciary*, 113th Cong. 1 (2013) (statement of Pamela Samuelson, Richard M. Sherman Distinguished Professor, Berkley Law School).

In November 2012, the House Republican Study Committee offered a proposal for copyright terms that would start out as free, but would gradually grow to require a larger fee and would terminate after forty-six years.³⁰⁵ The specific terms advised by that report were:

- A. Free 12-year copyright term for all new works – subject to registration, and all existing works are renewed as of the passage of the reform legislation. If passed today this would mean that new works have a copyright until 2024.
- B. Elective 12-year renewal (cost 1% of all United States revenue from first 12 years – which equals all sales).
- C. Elective 6-year renewal (cost 3% of revenue from the previous 12 years).
- D. Elective 6-year renewal (cost 5% of revenue in previous 6 years).
- E. Elective 10-year renewal (10% of ALL overall revenue – [minus] fees paid so far).³⁰⁶

Under this system economic actors would make a choice on whether to renew their copyright at an increasing fee rate – the idea being that since the cost of copyright terms to society and other content creators, versus the benefit of the content creation, becomes more significant the longer copyright terms are, then if an owner wanted to renew their term every term would become more expensive until it reached market equilibrium and they chose not to renew because the economic costs were higher than the expected value. This proposal was designed to use market forces to have copyright holders choose how much retaining their copyright was worth. If a copyright holder like Disney decided they wanted to maximize their monetization of some AAA movie, then they would have the option of paying the high cost to receive the full forty-six years.³⁰⁷ Under this proposal, content valued at a lower monetary value would be unlikely to be renewed and registered beyond the first renewal period. Things that are not intended to be under copyrights protection, like normal e-mails, texts, tweets and Facebook messages, would, by default, not be copyrighted unless someone took an affirmative act to copyright them.³⁰⁸

The purpose of the report was to begin a conversation on how to fix copyright by restoring its original public meaning under the Constitution – and given that purpose, it did help foster a debate. The report was generally well

³⁰⁵ Derek Khanna, *RSC Policy Brief: Three Myths About Copyright Law and Where to Start to Fix It*, REPUBLICAN STUDY COMM. 8 (Nov. 16, 2012), <http://bit.ly/1v8o7tj>. To be clear this is not my personal recommendation. I was asked to produce this report on behalf of a Congressional organization of over one-hundred-sixty Members of Congress.

³⁰⁶ *Id.*

³⁰⁷ *Compare* The Copyright Act of 1831, 4 Stat. 436 (1831); *with* The Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909).

³⁰⁸ To be clear while the author of this piece authored that report for the RSC, the report was the consensus of the staff members of the organization, and the author presently would improve upon some of the ideas there rather than implement that exact proposal, it was created for the committee and to foster a debate on potential reforms.

received, particularly by conservative and libertarian organizations.³⁰⁹ Since the report, there has been more serious consideration of copyright term reform on several fronts.³¹⁰

A. Copyrighting One Billion Facebook Messages Per Day

The disparity between the Founder's copyright of fourteen years and modern copyright terms that last longer than anyone could ever be alive should be particularly glaring to modern audiences who have seen a massive expansion of the scope of copyright, in addition to the length. Today, everyone is a content creator in a way that average people were not in the early twentieth century. Protecting our personal e-mails, Facebook posts, and tweets under copyright for our lifetimes, plus seventy years, does not seem to meaningfully fulfill the constitutional mandate of promoting the progress of the sciences. Furthermore, social norms on those forms of creation differ extremely from the law. Of course, this is not to justify large-scale piracy, but social norms are such today that forwarding an e-mail from a friend is not perceived as a potential legal problem – even among the most litigious in favor of maximalist copyright positions. However, under many readings of the copyright statutes, the content of your e-mails are copyrighted and forwarding an e-mail without permission, especially if the e-mail says not to forward, could be considered copyright infringement, making you liable.³¹¹

Professor Tom W. Bell's book, *Intellectual Privilege: Copyright, Common Law, and the Common Good*,³¹² makes a compelling case for restoring the copyright term of the Founders for fourteen years with a potential fourteen year extension if the author is still alive.³¹³ While this author is not convinced that

³⁰⁹ See Ezra Klein, *Derek Khanna Wants You to Be Able to Unlock Your Cellphone*, WASH. POST (Mar. 9, 2013), <http://wapo.st/11FRE5D> (“The memo was approved...and put online, where the reaction was enthusiastic. ‘The American Conservative Union put the memo on their front page,’ Khanna says.”).

³¹⁰ See *The Register's Call for Updates to U.S. Copyright Law: Hearing Before the S. Comm. on Courts, Intellectual Property and the Internet Comm. on the Judiciary*, 133th Cong. 7-8 (2013) (statement of Maria A. Pallante, Register of Copyrights, United States Copyright Office) (suggesting that Congress should reconsider the “principle of copyright law that copyright owners should grant prior approval for reproduction and dissemination of their works.”); see also DEP'T OF COMMERCE: INTERNET TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 29-30 (July 2013) (stating that the extension of copyright terms has been a factor in the creation of the “orphan works” problem); see Pethokoukis, *supra* note 2 (arguing that copyright law has become a form of cronyism for companies).

³¹¹ Ned Snow, *A Copyright Conundrum: Protecting Email Privacy*, 55 U. KAN. L. REV. 501, 507-8 (2007).

³¹² TOM W. BELL, *INTELLECTUAL PRIVILEGE: COPYRIGHT, COMMON LAW, AND THE COMMON GOOD* (Founders' ed., 1st ed. 2014).

³¹³ See *generally id.* (advocating a return to the copyright laws as established in The

this short term is necessarily optimal, while “fourteen plus fourteen” years may seem short, it should be noted that commercial exploitation of a work took much longer in 1790.³¹⁴ In 1790 it was much more difficult to get a book printed, it was slower to distribute the book by land and ship or to get it stocked in book stores, and it took a longer time to advertise a work across the country.³¹⁵ Because today’s commercial exploitation can often reach a global audience in a matter of days or hours, the argument for needing copyright durations exponentially longer from that of our Founders seems more difficult to sustain. However, at the same time, today books can be turned into movies and other derivative works that didn’t exist in the 18th century. The costs of modern production of a major film are vastly higher than the costs of producing and distributing a book in the 18th century, but the ability to monetize has also kept up significantly, and given the revenue curves for movies, if a movie does not make its cost back in the first twenty-eight years, it’s unlikely to make up the rest of the difference in the next hundred.

B. Congressional Capture, Comparing Evolution of Patent and Copyright law

We’ve established how rights holders, as rational economic actors, have a vested interest in manipulating the system to benefit themselves while potentially hurting new content creators, but there is also robust data to support congressional capture, which can be most clearly demonstrated by comparing the evolution in copyright terms with the evolution in patent terms.³¹⁶

Both copyright and patents began with terms of fourteen years, but while copyright has extended 580%, patent terms have only expanded 43%, to twenty years.³¹⁷ And copyrights and patents were both considered by James Madison as a form of monopoly where the benefit outweighs the “evil.”³¹⁸ Thus, analyzing the evolution of copyrights versus the evolution of patents helps demonstrate the direct impact of cronyism.³¹⁹ As Edward C. Walterscheid ex-

Copyright Act of 1790 and the copyright of the book itself was structured to reflect those copyright laws).

³¹⁴ See e.g., WILLIAM PATRY, *COPYRIGHT LAW AND PRACTICE* 34 (2000) (between 1790-1800 “the distribution of books was primarily local.”).

³¹⁵ See e.g., Robert A. Gross, *Introduction*, in *HISTORY OF THE BOOK IN AMERICA VOL. 2, AN EXTENSIVE REPUBLIC: PRINT, CULTURE, AND SOCIETY IN THE NEW NATION, 1790-1840* 5-6 (Robert A. Gross & Mary Kelley eds., 2010) (describing the extensive periods of time it took to circulate printed news throughout the last decade of 18th century America and into the 19th Century)

³¹⁶ See *Eldred v. Ashcroft*, 537 U.S. 186, 201-02 (2003) (“Because the Clause empowering Congress to confer copyrights also authorizes patents, congressional practice with respect to patents informs our inquiry.”).

³¹⁷ Walterscheid, *supra* note 65, at 41.

³¹⁸ Madison, *supra* note 27.

³¹⁹ However, the Supreme Court has noted that in regard to copyright and patents, “[t]he

plains “While there are recognizable similarities between the Patent Act of 1790 and the present patent statutes, one is hard pressed to find much recognizable from the Copyright Act of 1790 in the present copyright statutes.”³²⁰

For copyright, there is a one major interest group that effectively manipulates the system and ensures works never enter the public domain.³²¹ On the other side, there is no discernable opposition interest group with anywhere near a comparable interest in stopping this elongation.³²²

But in the realm of patent terms, there are interest groups on both sides of the issue.³²³ For every company that benefits from patent protection, there are other companies waiting for that protection to end, so they can use the technology. However, it’s even more complex than that, because these two sides are often represented even internally within a company, where the company gets its new inventions patented but is also waiting on its competitors patents to lapse.³²⁴ There are certainly “patent trolls”³²⁵ that only have a pecuniary interest

two areas of law, naturally, are not identical twins.” and care must be taken “in applying doctrine formulated in one area to the other.” But nonetheless the Court has acknowledged the “historic kinship between patents law and copyright law.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439, n. 19 (1984); *See* Edward C. Walterscheid, *Divergent Evolution of the Patent Power and the Copyright Power*, 9 *Intell. Prop. L. Rev.* 307, 309 (2005)

[T]he grouping of the patent power and the copyright power in the same clause suggests that the Framers viewed them as at least fraternal twins with similar characteristics. That this was the case is further evidenced by the use of the singular “the exclusive Right” with regard to both powers. It is reasonable to assume that by using the singular “the exclusive Right” and combining authority to create both patents and copyrights in the same Clause, the Framers intended the legal consequences of both the patent grant and the copyright grant to be similar, if not identical.

Id.

³²⁰ Walterscheid, *supra* note 319, at 308-09.

³²¹ *See Copyright Extremists Shouldn’t Control Information*, *supra* note 10 (discussing the “copyright lobby”).

³²² *See* Timothy B. Lee, *15 Years Ago, Congress kept Mickey Mouse Out of the Public Domain. Will They Do it Again?*, *WASH. POST* (Oct. 25, 2013), <http://wapo.st/1gu2nCJ> (“[N]on-profit groups...served as public-interest watchdogson copyright issues...[b]ut his efforts to recruit them to fight term extension fell flat. With the bill looking unstoppable, most of the groups chose to make peace with the forces pushing the bill.”).

³²³ *See e.g.*, Gary Robbins, *Consumers to Benefit as Patent Expires on Plavix*, *UT SAN DIEGO* (May 4, 2012 6:30 AM), <http://bit.ly/1v8oDYj> (explaining that the patent term for the drug Plavix, which generated 4.7 billion dollars of revenue in 2010, was set to expire and that generic forms would hit the market at that time).

³²⁴ In 2009 the patent for FDM printing technology expired, allowing 3D printing companies to utilize this technology. These 3D printing companies in turn patent their own printing process. Melba Kurman & Hod Lipson, *Why Patents Won’t Kill 3D-Printing Innovation (Op-Ed)*, *LIVESCIENCE* (July 29, 2013, 10:25 AM), <http://www.livescience.com/38494-3d-printing-and-patent-protection.html>.

³²⁵ Brenda Sandburg, *Trolling for Dollars; Patent Enforcers Are Scaring Corporate America, and They’re Getting Rich – Very Rich – Doing It; Special Report; Patent Enforcers*, *LAW.COM* 1 (July 30, 2001), <http://www.phonetel.com/pdfs/lwtrolls.pdf> (“A patent troll

for longer and stronger patent terms, but many big companies that lobby have interests on both sides.³²⁶ Therefore, as far as Washington sees the issue, there are interest groups on both sides (albeit with different levels of strength), and major companies have interests split between the two sides. This is not to say that patent policy is perfect, Madison warned us to “guard” both copyrights and patents “ag[ain]st abuse,”³²⁷ and appeared to be more worried about patents as well, but at least more than one vested interest is represented in the policy discussion for patents.

Patents represent a deal between innovators and the general public: teach the world how to make your invention (thereby no longer having a trade secret) and, in return, you get an exclusive period to profit from that invention through a government-granted monopoly, which we treat like a property right.³²⁸ The various special interest perspectives can be seen in the current debate on patent reform, where some interests represent non-practicing entities with large patent portfolios, some represent established businesses with patents such as Microsoft and Google, and some at least claim to represent venture capitalists and the start-up community. Each has potentially divergent interests on patent law.

In the vernacular of Federalist 10, patents create “factions” in favor of longer terms, which combat other “factions” in favor of shorter terms, and this feud helps keep patent term lengths under control.³²⁹ In 1790, patent terms were fourteen years, and today they are twenty years.³³⁰ Additionally for most of the groups involved in lobbying on patent policy, patents are just one of many issues they care about.³³¹ As a result, they have to set lobbying priorities, rather than devoting all their firepower toward this one issue.

But when it comes to copyright terms, as will be shown in the next section, the state of play is markedly different – there are no factions to fight factions on copyright terms.

is somebody who tries to make a lot of money off a patent that they are not practicing and have no intention of practicing and in most cases never practiced.”).

³²⁶ Companies in the pharmaceutical industries would support longer patent terms whereas companies in the software industry benefit from shorter patent terms due to the nature of software innovation. See Posner, *supra* note 10.

³²⁷ Madison, *supra* note 27.

³²⁸ See *American Foundry & Mfg. Co. v. Josam Mfg. Co.*, 79 F.2d 116, 117 (8th Cir. 1935) (“A patent is a governmental grant of monopoly for the making, selling, and use of a novelty (disclosed therein) as claimed by the patent.”).

³²⁹ THE FEDERALIST NO. 10, at 53-55 (James Madison) (E.H. Scott ed., 1898).

³³⁰ Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790); 35 U.S.C. § 154(c) (2012).

³³¹ See Erin Mershon & Tony Romm, *Big Tech Tracks Are All Over D.C. Patent War*, POLITICO (Apr. 27, 2014, 10:41 PM), <http://politi.co/QUGFj1> (“I get why companies are all fighting like crazy over this...[t]heir business models are dependant on patents, and everybody has a different stake in the patent system.”).

C. Bringing a Knife to a Gunfight: One Sided Copyright Term Battles

Deliberations on the last major copyright extension – 1998’s Sonny Bono Copyright Term Extension Act – began with a U.S. Copyright Office hearing in 1993 on whether to extend the duration to “life plus seventy.”³³² At the time, the register reported that “perhaps because legislation did not appear on the horizon, only representatives who strongly supported increasing the term of protection appeared.”³³³ This is one advantage that special interests can take advantage of, having lobbyists on the ground gives them knowledge of upcoming legislation and hearings before the general public knows, so it’s not entirely surprising that they were the only ones represented. But once legislation was introduced and this legislative movement was known outside of the typical D.C. circles, this one-sided war did not change. In 1995, with legislation now on the table:

[N]o witness and no member of Congress expressed concern that the extant term of copyright protection was inadequate to encourage authors to create and distribute new works of authorship...[n]o witness or member of Congress suggested that circumstance or government action had prevented copyright owners from exploiting their works to the fullest extent during the copyright terms they had already enjoyed.³³⁴

Under the Constitution, the operative question for lawmakers should have been how an extension would promote the progress of science or the useful arts, the Founders’ clear instructions.³³⁵ As mentioned, earlier, the 1909 report from the Senate Committee on Patents (S. 9440) noted that certain legislation would be beyond the power of Congress,³³⁶ that copyright law is “not primarily for the benefit for the author, but primarily for the benefit of the public.”³³⁷ That report argued that “Congress must consider...two questions: [f]irst, how much will the legislation stimulate the producer and so benefit the public; and, se-

³³² *Hearings on H.R. 989, H.R. 1248, and H.R., supra* note 88, at 1 (statement of Hon. Carlos J. Moorhead, Chairman of the subcommittee).

³³³ Brief of Intellectual Property Law Professors as Amici Curiae Supporting Petitioners at 3, *Eldred, et. al., v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

³³⁴ *Id.* at 6.

³³⁵ See *Copyright Extremists Shouldn’t Control Information, supra* note 10 (“The purpose of copyright law is to provide incentives and protection to authors to create and publish original works, not give corporations the power to control the flow of information.”).

³³⁶ See COMM. ON PATENTS, TO AMEND AND CONSOLIDATE ACTS RESPECTING COPYRIGHT, H.R. REP. NO. 2222, at 6-7 (1909)

The object of all legislation must be...to promote science and the useful arts...[T]he spirit of any act which Congress is authorized to pass must be one which will promote the progress of sciences and the useful arts, and unless it is designed to accomplish this result and is believed, in fact, to accomplish this result, it would be beyond the power of Congress.

Id.

³³⁷ *Id.* at 7.

cond, how much will the monopoly granted be detrimental to the public.”³³⁸ Congress must use copyright to confer “a benefit upon the public that outweighs the evils of the temporary monopoly.”³³⁹

While this was the consensus from the Founding era until 1909, this framework had no place in the discussion in 1995-1998 for the Sonny Bono Act, in fact such considerations appear never to have been discussed seriously, in large part because no interest group was forcing Congress to do so.³⁴⁰ Instead, deliberations were dominated almost completely by large content creators, who accounted for roughly six percent of U.S. GDP and represented either the largest or second-largest U.S. export.³⁴¹ In 1995-1998 they had significant lobbying influence, which has only grown more substantial through present day.³⁴²

One of the main corporate copyright owners engaged in deliberations of the 1997 bill was the Disney Corp., which led the charge for copyright term extension.³⁴³ Disney’s copyright on its flagship Mickey Mouse character had accounted for up to \$8 billion in revenue in 1998, they certainly had a lot to lose and no other company had anywhere close to a similar stake in seeing the legislation fail.³⁴⁴ Then-Disney Chairman Michael Eisner met personally with then-Senate Majority Leader Trent Lott, R-Miss.,³⁴⁵ and Disney’s political action committee contributed to Lott’s campaign on the same day that he signed

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ See Marvin Ammori, *The Uneasy Case for Copyright Extension*, 16 HARV. J.L. & TECH. 288, 293 n. 32 (2002) (citing *Intellectual Property Rights: Film Industry Perspective: Hearings on H.R. 2589 Before the Subcomm. on Int’l Econ. Policy and Trade of the House Int’l Relations Comm.* 105th Cong. (1998) (statement of Bonnie J. K. Richardson, Vice President, Trade and Federal Affairs, Motion Picture Association of America))

³⁴¹ Brief of the Sherwood Anderson Literary Estate Trust et al., as Amici Curiae Supporting Appellants, *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001) (No. 99-5430).

³⁴² According to Opensecrets.org, an organization that tracks disclosure information, in 1998, TV/Movies and Music related industry lobbying was \$33 million, with 451 lobbyists. But in 2011 the next time the industry was pushing for major legislation, SOPA/PIPA, they spent \$123.1 million lobbying, a 373% increase in annual spending. Further as for contributions to campaigns and PACs, in 1998 the industry spent \$16.9 million, in 2012 they spent \$65.9 million. See *TV/Movies/Music*, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby/indusclient.php?id=B02&year=1998> (last visited Nov. 8, 2014) (1998 lobbying); see also *TV/Movies/Music*, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby/indusclient.php?id=B02&year=2011> (last visited Nov. 8, 2014) (2011 lobbying); see also *TV/Movies/Music*, OPENSECRETS.ORG, <https://www.opensecrets.org/industries/indus.php?ind=B02> (last visited Nov. 8, 2014) (campaign contributions).

³⁴³ Janet Wasko, *The Magical-Market World of Disney*, 52 MONTHLY REV., (2001).

³⁴⁴ Daren Fonda, *Copyright’s Crusader*, BOSTON GLOBE MAG. (Aug. 29, 1999), <http://www.public.asu.edu/~dkarjala/commentary/Fonda8-29-99.html>.

³⁴⁵ *Disney Lobbying for Copyright Extension No Mickey Mouse Effort*, CHI. TRIB. (Oct. 17, 1998), <http://www.public.asu.edu/~dkarjala/commentary/ChiTrib10-17-98.html>.

on as co-sponsor of the bill.³⁴⁶ Within a month, Disney also gave “\$20,000 in soft money to the National Republican Senatorial Committee.”³⁴⁷ In the House, “[o]f the thirteen initial sponsors...ten received contributions from Disney’s PAC”³⁴⁸ Additionally, “on the Senate side, eight of the twelve sponsors received contributions.”³⁴⁹

For companies like Disney and trade associations like the MPAA, strong copyright protection is their most important lobbying issue and they are able to mobilize for action on this objective without hurting other efforts – this is very likely the biggest issue they cared about at the time. According to lobbying records and media accounts, there is no company with a comparable interest in shorter copyright terms.³⁵⁰ One industry completely dominated the discussion.

Some in the content lobby have pointed to technology companies as a special interest that confronts the content lobby in their agenda – but in the cases of term length in particular this conclusion is false, misleading and contradicted by the evidence.³⁵¹ This seems plausible given that big tech is certainly spending quite a bit of cash in Washington.³⁵² Sometimes this narrative has even entered academic literature, as a journal article by Paul Schwartz and Georgetown Law Dean William Treanor argues “intellectual property issues frequently pit powerful economic actors against each other [and that] the political process generally works well in this realm.”³⁵³ Treanor goes on to argue that eBay, Lexis and WestLaw have an interest in protecting their computer-

³⁴⁶ Jesse Walker, *Copy Catfight*, REASON (Mar. 1, 2000, 12:00 AM), <http://reason.com/archives/2000/03/01/copy-catfight>.

³⁴⁷ *Id.*

³⁴⁸ *Disney Lobbying for Copyright Extension No Mickey Mouse Effort*, *supra* note 345.

³⁴⁹ *Id.*

³⁵⁰ *See Why is Congress Criminalizing Copyright Law?*, *supra* note 10 (“Congress seems intent on changing all our intellectual property laws to benefit big corporations.”); *see also Why Disney Has Clout with the Republican Congress*, *supra* note 10

‘Limited time’ is not only a constitutional requirement, it is an excellent rule. There is no good reason for the remote descendants of James Madison, Julia Ward Howe, or Thomas Nast to receive royalties on the Federalist Papers, the Battle Hymn of the Republic, or Santa Claus. . . . [W]hy did Judiciary Committee Republicans quietly put through legislation that hurts the public interest but is so immensely profitable to Disney?

Id.

³⁵¹ *See Copyright Extremists Shouldn’t Control Information*, *supra* note 10 (“Copyright extremists...the music labels and Hollywood argue that current laws are not strong enough, and they are lobbying for an assortment of new anti-consumer legislation. One proposal would allow them to vandalize computer networks that they believe might be transmitting unauthorized content.”).

³⁵² Spending more than \$61 million in 2013. Rich McCormick, *Google Leads Pack as Ten Tech Firms Spend More than \$61 Million Lobbying Washington*, THE VERGE (Jan. 22, 2014, 7:58 PM), <http://bit.ly/1AIYyKE>.

³⁵³ Paul Schwartz & William Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2405 (2003).

ized data vs. other companies who want free access, and concludes that “[t]hese companies seem well-matched in terms of economic resources and likely political clout.”³⁵⁴ He concludes the same with content providers pushing for anti-piracy technology and high-technology companies on the other side.³⁵⁵ While much of this journal article is well researched and articulated, this portion is demonstrably false – but it reflects a position commonly believed. Treanor is arguably correct that on data protection there are two major interests, and for piracy technologies there are two major interests; however, Treanor’s journal article is specifically an epitaph on copyright term lengths. Seeing two arguably even battles on copyright, battles that have been traditionally dominated by the content industry, and therefore concluding that copyright term lengths must be the same is illogical. This is an example of common wisdom that is demonstrably incorrect.

It is convenient for the content industry to be able to point to another “special interest” group on the other side, but it’s not an accurate representation of the actual lobbying landscape on particular copyright issues. While technology companies sometimes have copyright related interests, such as for safe harbor under the DMCA, provisions which allow for user generated websites like Youtube, Facebook and Twitter to flourish, and provisions which they actively lobby on behalf of,³⁵⁶ there is no evidence of technology companies ever lobbying against extension of copyright terms. Further, the main technology companies that the content industry points to as being their contender didn’t even exist during the last copyright term battle.³⁵⁷

Term extensions are an issue that they have never devoted resources to confront, allowing for a one-sided special interest battle. Consider that while Disney had billions to gain from legislation, no technology company, or for that matter public interest group or other organization, had anything like a comparable financial stake that would be forwarded by shortening copyright lengths or holding them steady. Makers of technologies like video cassette and digital video recorders, personal audio players and satellite television all have had

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ See Gerald C. Pia Jr. & Brian C. Roche, *Has The Internet Killed the Video Star*, THE CONN. L. TRIB. 1 (Apr. 2007), <http://bit.ly/1wtsUKg> (“[T]he DMCA is also the result of lobbying by Internet and technology companies, who managed to obtain certain ‘Safe Harbors.’”).

³⁵⁷ Google was founded on September 4, 1998, Facebook was founded on February 4, 2004, Twitter was founded on March 21, 2006. *Company*, GOOGLE, <https://www.google.com/about/company/> (last visited Nov. 9, 2014) (Google incorporation date Sept. 4, 1998); Nicholas Carlson, *At Last – The Full Story of How Facebook Was Founded*, BUS. INSIDER (Mar. 5, 2010, 4:10 AM), <http://read.bi/K5ZqN1> (Facebook launched Feb. 4, 2004); *About*, TWITTER, <https://about.twitter.com/milestones> (last visited Nov. 9, 2014) (co-founder Jack Dorsey sends first tweet on Twitter, Mar. 21, 2006).

run-ins with the content industry,³⁵⁸ but the length of copyright terms has been irrelevant to those legal feuds. Given large but limited lobbying assets, they largely avoid policy battles in which they don't have a stake such as copyright terms.

This perspective is bolstered by evidence from the hearings on the legislation, in the Senate Judiciary Committee report in 1996, Sen. Hank Brown, R-Colo. – the panel's only opponent to extending copyright terms – wrote that he “thought it was a moral outrage...[t]here wasn't anyone speaking out for the public interest.”³⁵⁹ Another report on the deliberations described the bill's opponents as “a far weaker coalition of college professors, constitutional lawyers, librarians and small town school teachers.”³⁶⁰ There is no report of major technology companies.

Today, the MPAA is even more powerful in manipulating the policy process than in 1998, which could be seen in their attempt to pass the Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA) in 2012.³⁶¹ After getting insufficient support from Members to pass that legislation in the face of 12 million Americans engaging to stop SOPA/PIPA, MPAA Chairman Chris Dodd, a former U.S. Senator from Connecticut, said:

Candidly, those who count on quote ‘Hollywood’ for support need to understand that this industry is watching very carefully who's going to stand up for them when their job is at stake...[d]on't ask me to write a check for you when you think your job is at risk and then don't pay any attention to me when my job is at stake.³⁶²

This statement shows the head of Motion Picture Association of America (MPAA), while lobbying for Congress to pass SOPA/PIPA, telling members of Congress that if they don't “pay any attention to me” on this issue, then Congress should not “ask me to write a check for you.”³⁶³ This statement appears to say: if you do not do this official act, voting for our legislation, we will not give you money in the future.³⁶⁴ If a quid-pro-quo could be established, which this statement seems to show, it would be a felony,³⁶⁵ which is the embodiment of what James Madison warned future generations of many years ago, that we

³⁵⁸ Derek Khanna, *Let Artists, Innovators, and the Public Define Our Copyright System*, WASH. POST (May 21, 2013), <http://wapo.st/1v8rrVq>.

³⁵⁹ Lee, *supra* note 322 (quoting Sen. Hank Brown (R-Colo.)).

³⁶⁰ *Disney Plots a Billion Dollar Plan to Rescue Mickey Mouse*, INDEPENDENT.IE (Feb. 16, 1998, 00:11), <http://bit.ly/1CcBNII>.

³⁶¹ *Behind the Scenes of SOPA and PIPA*, POL. & POL'Y, <http://politicsandpolicy.org/article/behind-scenes-sopa-and-pipa> (last visited Nov. 9, 2014).

³⁶² *Exclusive: Chris Dodd Warns of Hollywood Backlash Against Obama Over Anti-piracy Bill*, FOXNEWS.COM (Jan. 19, 2012), <http://fxn.ws/1Jiww34>.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ Derek Khanna, *The Conservative Case For Taking On The Copyright Lobby*, BUS. INSIDER (Apr. 30, 2014, 11:50 AM), <http://www.businessinsider.com/time-to-confront-the-copyright-lobby-2014-4>.

“must guard these instruments with strictness ag[ainst] abuse.”³⁶⁶ Madison was worried about abuse likely because he knew how vested interests had used their connections with the King to get special favors for government monopolies, and he likely knew that in the future a vested interest would gain a close relationship with government and use their influence to use copyrights and patents to gain new wealth and distort the purpose from the constitutional mandate, and thereby society would pay the cost of this abuse.³⁶⁷

Dodd’s statement was met with public outrage and a White House petition demanding that the Administration investigate Chris Dodd for corruption stated that “[t]his is an open admission of bribery and a threat designed to provoke a specific policy goal.”³⁶⁸ Yet, after the petition received the required number of signatures for a response, the White House responded merely by saying that they won’t “comment on this petition because it requests a specific law enforcement action.”³⁶⁹ It does not appear that any investigation was ever conducted.

Within the year, the House Republican Study Committee issued the report previously mentioned here on potential ideas for copyright reform. After that report was released and received significant support from the conservative side, as well as a variety of outlets across the political spectrum, the report was taken off-line under pressure from special interest groups representing the content industry – and within 24 hours.³⁷⁰

Suspicion of cronyism is not a perspective only held by outside observers; even congressional organizations have recognized the legislative process as being manipulated by special interests.³⁷¹ The Young Guns Network’s *Room to Grow Report*, representing Majority Leader Kevin McCarthy, former Majority Leader Eric Cantor and Chairman of the House Budget Committee Paul Ryan among others, concluded that current copyright terms were the direct result of cronyism rather than thoughtful policy considerations – and they are certainly in a position to know about the influence of the content industry upon their

³⁶⁶ Madison, *supra* note 27.

³⁶⁷ See Khanna, *supra* note 365 (arguing that the influence of the Chris Dodd and the MPAA on the SOPA and PIPA legislation is what James Madison feared with copyright).

³⁶⁸ *We the People Petition: Investigate Chris Dodd and the MPAA for bribery after he publicly admitted to bribing politicians to pass legislation*, THE WHITE HOUSE (Jan. 21, 2012), <http://1.usa.gov/1sOXZIW>.

³⁶⁹ *Id.*

³⁷⁰ As previously mentioned, the author of this journal article was asked to draft that report for the RSC.

³⁷¹ See James Pethokcukis, *Regulatory & Financial Reforms To Combat Cronyism and Modernize Our Economy* YOUNG GUN NETWORK 85 (2014), <http://ygunetwork.org/wp-content/uploads/2014/05/Room-To-Grow.pdf> (stating that effective lobbying has extended copyright up to 120 years for “corporate authors.”).

own members of Congress.³⁷² Furthermore, the *Room to Grow Report* concluded, “over the years, copyright and patent law have evolved into cronyist protection of the revenue of powerful incumbent companies – a type of regulation that hampers innovation and entrepreneurship.”³⁷³ This is an organization created by House leadership that is saying that “powerful incumbent companies” have turned copyright terms into “cronyist protection.”

It should not be a surprise that of the twenty-six current members of the House Judiciary Subcommittee on Intellectual Property, at least eighteen received donations from the RIAA, MPAA and Disney for the 2012 and 2014 cycles.³⁷⁴ MPAA, RIAA and Disney have been working with the Chamber of Commerce on lobbying for stronger copyright policy and for longer copyright terms in our international treaties.³⁷⁵ The Chamber of Commerce has spent over \$1 billion dollars lobbying from 1998 till 2013, and strong copyright protection has been a major priority.³⁷⁶ In fact, according to Opensecrets.org, a non-profit organization that researches and documents public filing information on lobbying and campaign donations, there has been a 358% increase in lobbying dollars for industries related to movies, music and TV from 1998 to 2012 (2012 being the last major copyright battle that the industry engaged in, SOPA/PIPA).³⁷⁷ From 1998/2012, the industry increased PAC and campaign donations by roughly 389%, from \$16.9 million in 1998 to \$65.9 million in 2012.³⁷⁸

D. Trans-Pacific Partnership and ‘Life+100’

In the past several years, 600 “cleared advisors” representing special interests and industry have been involved in closed-door negotiations over the pro-

³⁷² *See id.*

³⁷³ *See id.*

³⁷⁴ *See R Street Policy Study No. 20, supra* note 6, at 19.

³⁷⁵ *See, e.g.*, GLOBAL INTELL. PROP. CENTER U.S. CHAMBER OF COM., LETTER FROM 1-800 CONTACTS ET AL TO MEMBERS OF UNITED STATES CONGRESS (2011) (including MPAA, RIAA, The Walt Disney Company, and U.S. Chamber of Commerce as signatories of a letter to Congress advocating new legislation to protect copyright on the internet).

³⁷⁶ David Steinbach, *Billion Dollar Baby: U.S. Chamber if First to Hit Lobbying Milestone*, OPENSECRETS BLOG (July 23, 2013), <http://bit.ly/13kLmsR>; *see Intellectual Property*, U.S. CHAMBER OF COM. (Aug. 4, 2010, 8:00 PM), <https://www.uschamber.com/intellectual-property-0> (“The mission of the U.S. Chamber of Commerce’s Global Intellectual Property Center is to champion intellectual property as a vital engine of global development, growth, and human progress.”).

³⁷⁷ *See* Lobbying 1998, *supra* note 342 (lobbying total for 1998, \$32,981,988); *see also* Lobbying 2012, *supra* note 342 (lobbying total for 2012, \$118,015,007).

³⁷⁸ *See* Campaign Contributions, *supra* note 342 (table providing the campaign contribution totals from 1990-2014).

posed Trans-Pacific Partnership Treaty (TPP).³⁷⁹ The content industry is well represented in this process, but the general public and alternative perspectives are not.³⁸⁰ In 2009, twenty-eight organizations filed fifty-nine lobbying reports and the draft TPP includes provisions that are pretty generous for the pharmaceutical industry and in favor of much stronger intellectual property protection.³⁸¹

Of the other current members on the ITAC's fifteen advisory committees, advisory committees for negotiations, there appears to be only one representative with a differing perspective on copyright from that of the content industry.³⁸² A seat was given to Yahoo's Laura Covington who is their Vice President of Intellectual Property policy.³⁸³ Yahoo has registered to lobby on copyright and trademark matters "including Copyright Act reform" but, as is predictable, Yahoo's disclosure lists "safe harbors/intermediary liability protec-

³⁷⁹ William Mauldin, *U.S. Says Not 'Rushing' Asia-Pacific Trade Deal*, WALL ST. J. (Sept. 26, 2013), <http://on.wsj.com/1x5aiCd>.

³⁸⁰ For example, the Vice President of the Recording Industry Association of America (RIAA), Neil Turkewitz, and Roy Kaufman, Managing Director of New Ventures at the Copyright Clearance Center are on the Industry Trade Advisory Committee on Intellectual Property Rights (ITAC 15). *Industry Trade Advisory Committee on Intellectual Property Rights ITAC15*, INT'L TRADE ASS'N, <http://ita.doc.gov/itac/committees/itac15.asp> (last visited Sept. 27, 2014). The Copyright Clearance Center is a "global rights broker for [. . .] books, journals, newspapers, magazines, images, blogs and ebooks." *About us*, COPYRIGHT CLEARANCE CENTER, <http://www.copyright.com/content/cc3/en/toolbar/aboutUs.html> (last visited Sept. 27, 2014). Other members on the board include Timothy Trainer, President of Galaxy Systems, Inc., which "represent[s] clients in a variety of IPR related matters. . . ." *Industry Trade Advisory Committee on Intellectual Property Rights ITAC15*, INT'L TRADE ASS'N, <http://ita.doc.gov/itac/committees/itac15.asp> (last visited Sept. 27, 2014). Another member, Erin-Michael Gill, is Executive Vice President of Qbase representing the MDB Capital Group LLC. *Id.* MDB Capital Group LLC called itself "The IP Investment Bank" and that it helped "Build strategically positioned IP portfolios that protect competitive advantage and create licensing revenue streams." *Building Dominant IP Strategies MDB Capital Intellectual Property Development Services*, MDB CAPITAL GROUP, <http://bit.ly/16zzXaD> (last visited Sept. 27, 2014). Their interests, while mainly on the patent side, are, in this author's opinion, obviously for stronger copyright and patent monopolies. *See generally id.* The other interests represented include: Gilead Sciences, Cisco, Verizon, General Electric Aviation, Johnson & Johnson, Infectious Disease Research Institute, Pharmaceutical Research and Manufacturers of America, Biotechnology Industry Organization, General Dynamics Advanced Information Systems, and Mylan Pharmaceuticals, Inc. *Industry Trade Advisory Committee on Intellectual Property Rights ITAC15*, INT'L TRADE ASS'N, <http://ita.doc.gov/itac/committees/itac15.asp> (last visited Sept. 27, 2014).

³⁸¹ Lee Drutman, *How Big Pharma (and others) began lobbying on the Trans-Pacific Partnership before you ever heard of it*, SUNLIGHT FOUND. (Mar. 13, 2014, 9:10 AM), <http://sunlightfoundation.com/blog/2014/03/13/tpp-lobby/>.

³⁸² *See Industry Trade Advisory Committee on Intellectual Property Rights ITAC15*, *supra* note 380 (Laura H. Covington, Esq. Vice President, Intellectual Property Policy, Yahoo! Inc.).

³⁸³ *Id.*

tions” not copyright term length.³⁸⁴ A cursory review of ITAC’s fifteen members does not show a single representative that has argued for not extending copyright terms.³⁸⁵

Previous members of ITAC fifteen included the Vice President of the Entertainment Software Association, Stevan Mitchell, the Association represents rights holders for software that have favored and lobbied for stronger intellectual property; Thomas Thomson, who is the Executive Director of the “Coalition for Intellectual Property Rights,” which advocates for stronger intellectual property laws and is a coalition of rights holders,³⁸⁶ as well as, allegedly, someone from the Motion Picture Association of America (MPAA).³⁸⁷ Furthermore, there are various accounts of representatives from other interests being deliberately excluded.³⁸⁸ The Computer and Communications Industry Association (CCIA) represents many tech companies such as Google and generally favors more balanced copyright and patent protection,³⁸⁹ but when CCIA nominated copyright lawyer, Andrew Bridges, whose career includes defending innovators against copyright lawsuits and has been outspoken in favor of copyright reform to the ITAC Fifteen advisory panel, he was rejected.³⁹⁰ Furthermore, no representatives from public interest-oriented organizations like the Electronic Frontier Foundation (EFF), Knowledge Ecology International, or Public Knowledge have ever been allowed to join ITAC Fifteen.³⁹¹ When government specifically excludes all public interest groups or entities with a different perspective, it’s easy to claim that the committee has a consensus in favor of longer copyright terms; therefore, government actors can argue that there is no problem associated with longer copyright terms because no one on the advisory committee brought up such a problem. But this intentional selection bias is a

³⁸⁴ *Yahoo! Inc.*, OPENSECRETS.ORG, <http://bit.ly/13kLpVq> (last visited Sept. 27, 2014).

³⁸⁵ INDUS. TRADE ADVISORY COMM. ON INTELLECTUAL PROP. RIGHTS, ITAC-15, ADVISORY COMMITTEE REPORT TO THE PRESIDENT, THE CONGRESS AND THE UNITED STATES TRADE REPRESENTATIVE ON THE U.S.-PANAMA TRADE PROMOTION AGREEMENT (TPA) 24 (2007), *available at* http://www.ustr.gov/archive/assets/Trade_Agreements/Bilateral/Panama_FTA/Reports/asset_upload_file960_11234.pdf; James Love, *Who USTR clears to see secret text for IPR negotiations? (Such as TPPA)*, KEIONLINE.ORG (Feb. 16, 2012, 8:49), <http://keionline.org/node/1362>.

³⁸⁶ INDUS. TRADE ADVISORY COMM. ON INTELLECTUAL PROP. RIGHTS, *supra* note 385; Love, *supra* note 385.

³⁸⁷ Margot Kaminski, *The Capture of International Intellectual Property Law through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977, 1001 (2014).

³⁸⁸ See, e.g., Timothy B. Lee, *Here’s Why Obama Trade Negotiators Push the Interests of Hollywood and Drug Companies*, WASH. POST (Nov. 26, 2013), <http://wapo.st/1v8sMvp>.

³⁸⁹ *Members*, COMPUTER & COMM. INDUSTRY ASS’N., <http://ccia.wpengine.com/about/members/> (last visited Sept. 27, 2014).

³⁹⁰ Kaminski, *supra* note 387; Lee, *supra* note 388.

³⁹¹ See generally *Industry Trade Advisory Committee on Intellectual Property Rights ITAC15*, *supra* note 380.

feature and not a bug to provide the intended perspective, for the policy makers. It's long been a Washington trick to invite others with your opinion to advise you on your opinion, and then to argue that there was a consensus in favor of that opinion – that's essentially what appears to be happening with the ITAC process.

If ratified, the TPP treaty – which involves twelve countries – would cover approximately forty percent of global trade,³⁹² and set the bar for another proposed treaty being negotiated with European countries, the Transatlantic Trade and Investment Partnership (TTIP).³⁹³ Among the provisions of this treaty are setting a bar for copyright durations.³⁹⁴ From a leaked draft, it has been revealed that the treaty includes language that would permanently lock in “life plus seventy” copyright terms.³⁹⁵ Mexico was proposing a longer copyright term of “life plus 100,” which – as of August 2013 – the United States had neither accepted nor rejected.³⁹⁶

The TPP, as leaked, is a clear illustration of policy laundering. Special interests cannot defend life plus seventy copyright terms in the United States, so instead they use an international treaty-making process to tie Congress's hand. The content lobby has done this effectively with numerous other treaties and this method has been their *modus operandi* for decades.³⁹⁷ But unlike other treaties involving copyright and patents, this treaty process has been subject to unprecedented secrecy: even members of Congress initially were unable to access the treaty.³⁹⁸ Today, they can access the treaty, but none of their staff is

³⁹² *FACT SHEET: The United States in the Trans-Pacific Partnership: Increasing American Exports, Supporting American Jobs*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <http://1.usa.gov/1v0Fmfh> (last visited Sept. 27, 2014).

³⁹³ See *Transatlantic Trade and Investment Partnership (T-TIP)*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/ttip> (last visited Sept. 10, 2014).

³⁹⁴ See *generally Secret TPP treaty: Advanced Intellectual Prop. chapter for all 12 nations with negotiating positions*, WIKILEAKS (Nov. 13, 2013), <https://wikileaks.org/tpp/index.html#start> (Articles Q.Q.G.6 and Q.Q.G.7).

³⁹⁵ *Id.*

³⁹⁶ Cyrus Farivar, *Secret treaty leaks, Mexico wants copyright extended even more than US does*, ARS TECHNICA (Nov. 13, 2013, 5:56 PM), <http://bit.ly/1r7URGM>.

³⁹⁷ See U.S. COPYRIGHT OFFICE, INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES 1 (2014) (“[T]he Berne Convention for Protection of Literary Artistic Work; the WIPO Copyright Treaty; the WIPO Performances and Phonograph Treaty; the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms; and the Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite.”).

³⁹⁸ See Commc'n Office, *IYCM: Wyden Statement Introducing “Congressional Oversight Over Trade Negotiations Act*, RON WYDEN SENATOR FOR OREGON (May 23, 2012), <http://1.usa.gov/112g4NC> (“[M]ore than two months after receiving the proper security credentials, my staff is still barred from viewing the details of the proposals that USTR is advancing.”).

allowed to assist them.³⁹⁹

Members of Congress can go to the USTR offices by themselves and be provided with a copy of the text to view, but cannot take note, make copies or bring uncleared staff.⁴⁰⁰ It's incredible that MPAA and Comcast appear to be given access to the draft of the treaty, while the public, congressional staff, and public interest groups like EFF/PK/KEI are not. Further, groups with one vested interest are given access to the treaty in a manner that they can actually use and influence, whereas members of Congress are effectively unable to actively influence the process or oversee it.

The TPP treaty is, in some ways, a very complicated document. The average member of Congress should not be expected to go to a closed room environment, without staff, and be able to read the treaty, understand exactly what it means, and retain everything in the treaty without notes. Industry is certainly not expected to do so, and the industries that are cleared are given a free pass to access the treaty. Saying that Congress can access the treaty in such an environment is a bit of a dog and pony show where the U.S. Trade Representative can pretend that he's allowing for Congress to be involved and oversee the negotiation, when it's functionally impossible for Congress to play any oversight role through this method. To claim this allows for legitimate oversight by Congress is similar to a dictator claiming his citizens elected him when he was the only candidate on the ballot. Procedurally Congress may have technical access, but has no actual way to provide substantive oversight in this process.

If the United States signs the TPP Treaty with a provision of minimum "life plus seventy" copyright duration provision, it will make it nearly impossible for Congress to ever consider implementing reforms that are more consistent

³⁹⁹ See *id.* Here is a section of a Senate Finance Committee hearing of Senator Ron Wyden from March 7, 2012, asking questions of former U.S. Trade Representative Ron Kirk: [Wyden:] What I've learned is that when trade agreements are negotiated, industry advisors sit in a far stronger position than virtually everyone in the Congress. For example, an industry advisor from the Motion Picture Association can sit at their desk with a laptop, enter their username and password, and see the negotiating text of a proposed trade agreement. Virtually no one in the Congress has the ability to do that. How is that right?

[Kirk:] Well, Senator, I want to make it plain, that it's not just industry, but it's all of the members of our trade advisory commissions which are established by this Congress, and they're cleared advisors, they have security clearance and they represent a broad range of interests from both industry and environmental groups, business groups...[e]very member of Congress, any member of Congress, that wants to see the text of a trade agreement we're negotiating has the ability to do so, as long as we're doing so in a secure environment that's private, so I would only offer that one clarification that any elected official in this body has the ability to see the same text as any of those cleared advisors.

Mike Masnick, *USTR Gives MPAA Full Online Access to TPP Text, But Still Won't Share With Senate Staffers*, TECHDIRT (June 25, 2012, 3:46 PM), <http://bit.ly/1zFjyje>.

⁴⁰⁰ See Commc'n Office, *supra* note 398.

with our founding tradition.⁴⁰¹ Closing the door to any potential reform is a substantial change in U.S. policy, because it would tie Congress' hands just as lawmakers are beginning to reconsider these policies.

Shortly after the 2012 House Republican Study Committee report calling for shorter copyright terms, in 2013, the head of the U.S. Copyright Office mentioned the desirability of considering shorter copyright terms, specifically having the last twenty years of life plus seventy be potentially optional, and called for the "Next Great Copyright Act."⁴⁰² The House Judiciary Committee responded with a series of hearings on copyright reform, going section by section through U.S. copyright law on potential reforms.⁴⁰³ The Commerce Department released a green paper advising on potential reforms to deal with orphan works, remixing and other issues.⁴⁰⁴ Now in 2014 House Leadership's Young Gun Network is calling for shorter copyright terms.⁴⁰⁵ If the White House signs the TPP treaty, as drafted so far, it could make reform almost impossible. By removing any prospect of reform from the table, it would be a nearly unprecedented policy coup for the content lobby in their attempt to effectively repeal the Constitution's Copyright Clause.

Instead of Congress signing a new treaty to further lock in U.S. copyright law,⁴⁰⁶ it should reconsider how it can best restore constitutional copyright, and what international agreements may need to be renegotiated in order to restore our founding principles.

In 1998, special interest groups lobbied Congress to pass copyright extension to life plus seventy, thereby keeping their works under copyright for another twenty years.⁴⁰⁷ In 2018, with the prospect of billions of dollars of copyrighted works falling into the public domain,⁴⁰⁸ it is extremely likely that these

⁴⁰¹ Shortening copyright terms would then require completely revising the TPP treaty.

⁴⁰² *The Register's Call for Updates to U.S. Copyright Law*, *supra* note 310, at 1 (Statement of Maria A. Pallante).

⁴⁰³ See e.g., *The Copyright Principles Project*, *supra* note 304 ("This afternoon's hearing is an initial step in this Subcommittee's effort to undertake a comprehensive review of our Nation's copyright laws.").

⁴⁰⁴ COPYRIGHT POLICY CREATIVITY, AND INNOVATION IN DIGITAL ECONOMY, DEPT. OF COMMERCE: INTERNET POLICY TASK FORCE (2013).

⁴⁰⁵ Pethokoukis, *supra* note 2, at 85.

⁴⁰⁶ See *Secret TPP treaty: Advanced Intellectual Property Chapter*, WIKILEAKS 1 (Nov. 13, 2013), <https://wikileaks.org/tpp/static/pdf/Wikileaks-secret-TPP-treaty-IP-chapter.pdf> (WikiLeaks obtained and published a draft version of the treaty text that was negotiated in secret by 12 nations, whose members account for 40% of global GDP).

⁴⁰⁷ Copyright Term Extension Act of 1998, S. 505, 105th Cong. (1998); 17 U.S.C. § 302 (2012); see *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003) (explaining that the 1998 Act largely took existing protections and simply extended them 20 years).

⁴⁰⁸ See Rachel Soloveichik & David Wasshausen, *Beaurue of Econ. Analysis, Copyright - Protected Assets in the National Accounts*, U.S. DEP'T OF COMMERCE 1, 7-8 (2013), <http://1.usa.gov/1AOTcut> (describing that 2007 levels of investment and the market for software and entertainment originals reached several hundred billions); see also Fonda, *supra*

same interest groups will be back before Congress to argue for longer copyright terms. They'll bring with them substantial PAC contributions and likely will push for life plus 100, since that is the copyright term of Mexico and there will be an argument that we must be "consistent" with such "international" copyright law. Unless Congress guards copyright against further abuse, these special interests will ensure that new works will never enter the public domain.

E. A Word on the Berne Convention

An elephant in the room for substantive discussions on reforming copyright term length has been the Berne Convention, which the United States ratified in 1988, nearly a century after the first country ratified the proposed Convention in 1886 (Switzerland).⁴⁰⁹ The Berne Convention threw out much of U.S. copyright law, and Berne was resisted for over a century because it was so inconsistent with U.S. legal tradition on copyright.⁴¹⁰ The fact that the United States rejected this international convention is quite significant, as the United States of America was "the single, commercially most important country to remain outside the Berne Union for its entire first century."⁴¹¹ Preceding the United States joining the Berne Convention, the U.S. removed several central tenets of U.S. copyright law such as requiring that work be registered to receive copyright.⁴¹² The existing copyright terms were twenty-eight years with an optional twenty-eight year renewal for a total of fifty-six years (Copyright Act of 1909), but copyright was extended to life of the author plus fifty years in 1976 as required in the Berne Convention.⁴¹³

Other treaties, such as TRIPS (Article 9), solidify these treaty obligations, as do several bilateral treaties.⁴¹⁴ But Berne does not preclude all copyright reform, for example going back to life plus fifty copyright terms is acceptable

note 344 (providing that Mickey Mouse brought in \$8 billion dollars in related revenue in 1998 alone).

⁴⁰⁹ See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified as amended in scattered sections of 17 U.S.C.).

⁴¹⁰ David Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States*, 55 LAW & CONTEMP. PROB. 211, 212-13 (1992).

⁴¹¹ PAUL GOLDSTEIN & P.B. HUGENBOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 38 (3d ed. 2001).

⁴¹² 102 Stat. at 2859.

⁴¹³ Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541, 2572 (1976) (codified as amended 17 U.S.C § 302 and amended again in 1988).

⁴¹⁴ *General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (The Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, 33 I.L.M. 81, 87 (1994) (herein after TRIPS); see U.S. COPYRIGHT OFFICE, *supra* note 397, at 1, 3-8 (discussing U.S. bilateral free trade agreements with a variety of countries).

under the Berne convention,⁴¹⁵ and should be explored by Congress immediately.

Observers have been too quick to assume that Berne precludes long-term substantive revisions of U.S. copyright policy.⁴¹⁶ The United States is currently drafting international treaties, defining the new global standards on copyright and patent matters; therefore, it is a convenient, but illogical, excuse for the U.S. to say “we can’t revise U.S. copyright policy because it’s in a treaty” when the U.S. wrote the most recent treaties and has been *the major advocate for these positions around the world*.⁴¹⁷ The U.S. could certainly use that trade power and influence that they are currently using to push copyright policy in one direction, to instead advocate to make copyright policy better, perhaps not immediately, but over the course of years. Copyright policy is a long-term process – advocates for the Berne Convention pushed for that treaty for over 100 years. Flippant responses that copyright can never be shortened because the Berne Convention precludes immediate action, is illogical based on the historical developments of copyright policy being inherently long-term driven.

The United States resisted the Berne Convention for over 100 years because generations of elected leaders believed it was inconsistent with U.S. copyright law.⁴¹⁸ The United States has pulled out of treaties before.⁴¹⁹ If policy makers firmly believed that Berne violated the U.S. Constitution’s language on copyright, then we would have an obligation to withdraw from Berne, or not recognize those portions. While Berne is an influential treaty that covers the world, it should not preclude the U.S. from finding and advocating for the best, and most constitutionally consistent, copyright policy.

The original Berne Convention had only ten countries represented.⁴²⁰ But the United States and Japan were only observers,⁴²¹ Liberia didn’t ratify the treaty

⁴¹⁵ *Berne Convention for the Protection of Literary and Artistic Works, Sep. 9, Completed at Paris on May 4, 1896, Revised at Berlin on Mar. 20, 1914, Revised at Rome on Jun. 2, 1928, Revised at Brussels on Jun. 26, 1948, and Revised at Stockholm on Jul. 14, 1967*, 828 UNTS 221, 235 (1972).

⁴¹⁶ Edward Lee, *Copyright, Death, and Taxes*, 47 WAKE FOREST L. REV. 1, 3 (2012).

⁴¹⁷ Dennis S. Karjala, *United States Adherence to the Berne Convention and Copyright Protection of Information-Based Technologies*, 28 JURIMETRICS J. 147, 147-48, 150-51 (1988).

⁴¹⁸ *Id.*

⁴¹⁹ See e.g., Wade Boese, *U.S. Withdraws From ABM Treaty; Global Response Muted*, ARMS CONTROL ASS’N, http://www.armscontrol.org/act/2002_07-08/abmjul_aug02 (last visited Sep. 10, 2014) (United States withdrew from 1972 Anti-Ballistic Missile Treaty in 2002).

⁴²⁰ *Treaties and Contracting Parties: Berne Convention*, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last visited Sep. 10, 2014) (showing the accession or ratification of the first 10 members).

⁴²¹ *Id.* (Japan acceded in 1899, 11 years after the initial convention).

and Tunisia was a French colony,⁴²² meaning that the Berne Convention was really an agreement of eight sovereign nations: Germany, Belgium, Spain, France, United Kingdom, Haiti,⁴²³ Italy, and Switzerland.⁴²⁴ This is certainly not representative of the modern economy, and it may not have been representative of the 19th century economy.⁴²⁵ The Berne Convention would expand but as drafted, it reflects the perspective of eight countries in the 19th century, a perspective that was vastly different from that of our Founders. Eventually most countries in the world would be forced to join the Berne Convention, in part because of TRIPS Article 9, and in part because the treaty was written to give special treatment to signatories creating an incentive for other nations to join.⁴²⁶

Today, the United States is the strongest advocate of longer copyright terms around the world, currently pushing Pacific Rim countries to expand their copyright terms from life plus fifty under Berne to life plus seventy under the TPP as drafted.⁴²⁷ In these negotiations we have found many other countries reluctant to embrace such long copyright terms, among other concerns.⁴²⁸ If the United States changed its position and decided to favor shorter copyright terms, such a move would likely be broadly supported by a number of countries that have been reluctant to sign onto Berne to begin with.

Imagine if India (joined Berne in 1928),⁴²⁹ Australia (joined Berne in 1928),⁴³⁰ South Korea (joined Berne in 1996),⁴³¹ Japan (joined Berne in 1899),⁴³²

⁴²² *Id.* (Liberia acceded in 1988, WIPO recognizes Tunisia as ratifying in 1887 despite their status as a French colony). Tunisia achieved independence in 1956. *See A Brief History of Tunisia*, U.S. DEP'T OF STATE, <http://africanhistory.about.com/od/tunisia/p/TunisiaHist1.htm> (last visited Sep. 10, 2014) (“Tunisia’s independence from France in 1956 ended the protectorate established 1881.”).

⁴²³ By this point Haiti was a sovereign nation no longer under colonial rule by the French. *Milestones: 1784-1800, The United States and the Haitian Revolution, 1791-1804*, U.S. DEP'T OF STATE, <https://history.state.gov/milestones/1784-1800/haitian-rev> (last visited Sep. 10, 2014).

⁴²⁴ *Treaties and Contracting Parties: Berne Convention*, *supra* note 420; *see Treaties and Contracting Parties: Berne Convention, Haiti*, WIPO, http://www.wipo.int/treaties/en/remarks.jsp?cnty_id=964C (last visited Sep. 10, 2014) (WIPO recognizes Haiti’s accession in both 1898 and 1995).

⁴²⁵ *See e.g., Treaties and Contracting Parties: Berne Convention*, *supra* note 420 (showing China’s accession to the Berne Convention took place in 1992).

⁴²⁶ *See Berne Convention for the Protection of Literary and Artistic Works, Sep. 9, 1886*, *supra* note 415, at 221 (various articles and provisions throughout outline the process of becoming a member, as well as the privileges and duties of membership).

⁴²⁷ *See Secret TPP treaty: Advanced Intellectual Property Chapter*, *supra* note 406, at 51.

⁴²⁸ The leaked draft indicates that negotiators from “VN/BN/NZ/MY/CA/JP” oppose the extension to 70 years. These countries are presumed to be: Vietnam, Brunei, New Zealand, Malaysia, Canada and Japan. *See id.*

⁴²⁹ *Treaties and Contracting Parties: Berne Convention*, *supra* note 420 (last visited Sep. 9, 2014).

⁴³⁰ *Id.* (Both Australia and India joined Berne as British colonies in 1928. Colonization

Russia (joined Berne in 1995),⁴³³ China (joined Berne 1992),⁴³⁴ Middle Eastern countries and African countries teamed together with the United States to create a more rational system that did a better job of protecting copyright holders, but for a copyright term that was based on economic data rather than lobbying manipulation. If a consensus could be reached of these countries,⁴³⁵ which is the point of trade agreements, such a new convention could become the new international standard.

Together these countries, all excluded from the original drafting of Berne, represent the vast majority of world population, economic activity and, most importantly, content creation. A survey of movie production from 2010 showed these countries dwarfed traditional Berne supporters by feature film output as India, U.S., China, Japan and South Korea represent 73.6% of top-ten production by country.⁴³⁶ U.S., China, Russia, India, Japan and Turkey make up 74.69% of top-ten book production.⁴³⁷ Both percentages go up when you look broader than just the top-ten, to over 80%.⁴³⁸

Neither of these percentages on content creation are scientific studies but rather use raw output for the purposes of establishing a rough proxy of influence in negotiation.⁴³⁹ This demonstrates that a potential post-Berne coalition in the twenty-first century, that may have a different perspective on copyright than the Berne original signatories from the nineteenth century, represents a sizable block and the modern economy is shifting more from the original Berne eight countries every day. None of these potential countries were original participants in Berne (other than the U.S. and Japan as observers) and were effectively forced to accept an already negotiated system.

was a big part of the spread of Berne); *see Treaties and Contracting Parties: Berne Convention, Australia*, WIPO, http://www.wipo.int/treaties/en/remarks.jsp?cnty_id=908C (last visited Sep. 10, 2014); *see also Treaties and Contracting Parties: Berne Convention, India*, WIPO, http://www.wipo.int/treaties/en/remarks.jsp?cnty_id=969C (last visited Sep. 10, 2014).

⁴³¹ *Treaties and Contracting Parties: Berne Convention*, *supra* notes 420.

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ This is not to downplay how difficult achieving such a consensus could be. China in particular has been very reluctant to substantively enforce copyright provisions.

⁴³⁶ The percentage of world movie production for these countries versus original Berne signatories goes up after the top 10 to over 80%. Given the permeation of Indian, Chinese, and American culture globally and among ex-patriots of each, the influence of these nations may be even larger than the number of movies produced. *See* ROQUE GONZALEZ, UIS INFORMATION PAPER NO. 14, EMERGING MARKETS AND THE DIGITALIZATION OF THE FILM INDUSTRY 11 (Lydia Deloumeaux & Jose Pessoa eds., 2013) (Table 4).

⁴³⁷ *New Book Titles Published this Year*, WORLDOMETERS, <http://www.worldometers.info/books/> (last visited Sep. 10, 2014).

⁴³⁸ *See* ROQUE GONZALEZ, *supra* note 436 (Table 4).

⁴³⁹ *See id.* (statistics from UNESCO Institute for Statistics).

Today, more than eighty percent of the world content creators could come to a separate agreement, call it the “Berne Modernization Treaty,” and if they did so, given their collective market power, the rest of world may be forced to go along.⁴⁴⁰ The Berne Convention’s genius was to create benefit for the participants and to effectively hurt those not in the treaty, if such a similar apparatus could be built in a 21st century world economy, it could supersede Berne. For example, some provisions of this hypothetical treaty could be set to only go into effect when a certain number of countries join the convention, meaning that lots of countries could jump from the Berne convention together without a short term risk of violating the Berne Convention but not having another similar convention.

A treaty from the nineteenth century, negotiated by eight countries that no longer represent the global economy, that appears to directly violate the Founder’s intentions on copyright policy, can be replaced with a more modern global treaty. What other such global treaties from the nineteenth century remain binding? The Geneva Convention from 1864 and the Paris Convention from 1883 appear to be the only other similar global conventions.

Such a reconsideration of global copyright policy, as advocated here, may not just be the interests of the general public and content creators, but could also benefit the interest of rights holders like MPAA and RIAA as well that are looking for enforceable provisions to clamp down on piracy in China, Russia and India.⁴⁴¹ Further, China has restrictions on the number of U.S. films that can be imported every year⁴⁴² – such provisions should be made illegal under this new treaty, and removing that barrier would have a major benefit for the movie industry.

The United States is currently negotiating new international treaties with Pacific Rim countries and Europe, collectively constituting the majority of U.S. trade.⁴⁴³ If policymakers believed that shorter copyright terms were more con-

⁴⁴⁰ With such a sizable block, there are many options available in an international treaty to make it beneficial for the world community to be in the treaty rather than out.

⁴⁴¹ See, e.g., Clifford Coonan, *MPAA Strikes Deal With China’s Xunlei to Prevent Piracy*, THE HOLLYWOOD REP. (June 4, 2014, 12:58 AM), <http://bit.ly/13J7lut> (“Xunlei [Google-backed Chinese-language video and music file-sharing firm] was sued in 2008 by the Hollywood studios for film piracy.”); see generally Richard Verrier, *Web piracy: Sites in Russia, China, Ukraine, Canada top MPAA list*, LOS ANGELES TIMES (Oct. 28, 2013, 1:12 PM), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-top-piracy-markets-20131028-story.html> (discussing pirated content websites in China and Russia); see also *2013 Out-of-Cycle Review of Notorious Markets*, U.S TRADE REPRESENTATIVE 3-11, 13-15 (Feb., 12, 2014), <http://1.usa.gov/PDM4vd> (identifying websites and markets within several countries as the largest offenders of piracy).

⁴⁴² Clifford Coonan, *supra* note 441; *China Retains Grip on Foreign Film Quota*, BBC NEWS ENTERTAINMENT & ARTS, <http://www.bbc.com/news/entertainment-arts-26152190> (last updated Feb. 12, 2014, 6:46).

⁴⁴³ See, e.g., *Secret TPP treaty: Advanced Intellectual Property Chapter*, *supra* note 406

sistent with the U.S. Constitution, better for the economy, and better for average citizens, then a longer-term strategy for treaty renegotiation could gradually extricate ourselves from our existing commitments, not dig us in further.

VI. CONCLUSION

Policymakers who care about the original public meaning of the Constitution must not abandon our constitutional obligation. We must heed James Madison's warning: *to guard these instruments against abuse*.⁴⁴⁴ The economists' consensus on this issue is clear: the free market, with a short term of copyright regulation, leads to the most optimal outcome of competition and allocation of resources.⁴⁴⁵ As the Nobel laureates and other economists argued in their *Eldred* brief, a "lengthened copyright term...keeps additional materials out of new creators' hands" and ultimately results in "fewer new works."⁴⁴⁶

Congress must confront special interests pushing for provisions in the Trans-Pacific Partnership Treaty that would make restoring constitutional copyright impossible. If Congress once again extends copyright in 2018, to ensure that works from the 1920s never enter the public domain, then what is the limit on duration? The de facto status really would be perpetual copyright, just on the installment plan.⁴⁴⁷ The public domain of the future cannot be protected without constraints on prospective copyright duration; otherwise it won't exist. It's ultimately up to Congress to determine where the financial incentive will outweigh the societal costs of what the Founders called a "monopoly." This is a data based question and every economic analysis conducted on the subject demonstrates the need for a shorter copyright duration than we have today.

Overall, we can be supporters of a copyright regime that protects and compensates creators, a noble goal, while recognizing that the current system has gone haywire. It's time to restore our founding principles and recognize that constitutional copyright would unleash new creativity and economic growth. A copyright term closer to that envisioned by our Founders, modified accord-

(WikiLeaks obtained and published a draft version of the treaty text that was negotiated in secret by 12 nations, whose members account for 40% of global GDP); *Trade in Services Agreement (TISA) Financial Services Annex*, WIKILEAKS 1 (June 19, 2014), <https://wikileaks.org/tisa-financial/WikiLeaks-secret-tisa-financial-annex.pdf>.

⁴⁴⁴ Elizabeth Fleet, *Madison's Detached Memoranda*, 3 WM. & MARY Q. 534, 551 (1946).

⁴⁴⁵ Newsroom Editors, *Economists Say Copyright Laws Are Killing Innovation, Hurting the Economy*, WASH. U. ST. LOUIS (Mar. 5, 2009), <http://news.wustl.edu/news/Pages/13656.aspx>.

⁴⁴⁶ Brief for George A. Akerlof, et al. as Amici Curiae Supporting Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) 2002 WL 1041846; *id.*

⁴⁴⁷ Reddy, *supra* note 49 (quoting Professor Peter Jaszi of American University's Washington College of Law).

ing to modern economic conditions, would be good for innovators, good for content creators and good for the public at large.