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GUARDING AGAINST ABUSE: RESTORING CONSTITUTIONAL COPYRIGHT

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INTRODUCTION

Copyrights are intended to encourage creative works through the mechanism of a statutorily created limited property right. Under both economic[1] and legal analysis,[2] they are recognized as a form of government-granted monopoly.[3]

Economic efficiency and constitutional law both suggest copyrights should serve to solve potential market failures, to "promote the progress of the sciences." In examining how long the specific terms for copyright and patent should be, Milton Friedman deemed the subject a matter of "expediency" to be determined by "practical considerations."[4] Friedrich Hayek, among the most forceful defenders of the importance of property rights, distinguished copyright from traditional property rights and identified a number of problems with modern copyright that he said called for "drastic reforms."[5] The conservative movement, which largely has supported originalist methods of interpreting the Constitution, traditionally has been in favor of copyright reform, with proposals usually including shorter copyright terms.[6]

Historically, copyright terms have been quite short. As required by Article 1, Section 8, Clause 8 of the U.S. Constitution, copyright can only be granted for "limited times." Evidence from the Founding Era suggests this limited duration was central to the original public meaning of the instrument, as evident in this definition from an 1803 British legal dictionary:

> COPY-RIGHT [sic], the exclusive right of printing and publishing copies of any literary performance, for a limited time.[7]

The framers incorporated a modified version of the British legal system of copyright, first into state laws; then, in the specific language that appears in the Constitution; and

1. Milton Friedman, "Capitalism and Friedman: Fortieth Anniversary Edition," 2002. http://books.google.com/books?id=iCRk066ybDAC&lpg=PA127&ots=QnYfBqU-kI&dq=&pg=PA127#v=onepage&q&f=false

2. Melville Nimmer, "Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas," Matthew Bender, 1963.

3. Decision, *Fox Film Corp. v. Doyal*, U.S. Supreme Court, 1932. http://supreme.justia.com/cases/federal/us/286/123/

4. Milton Friedman, "Capitalism and Freedom: 40th Anniversary Edition," p. 127, University of Chicago Press, 2002.

5. F.A. Hayek, "Individualism & Economic Order," University of Chicago Press, 1948. http://mises.org/books/individualismandeconomicorder.pdf

6. Steve Forbes, "Fact and Comment," *Forbes*, March 31, 2003. www.forbes.com/forbes/2003/0331/027.html

7. Thomas Potts, "A compendious law dictionary, Containing both an explanation of the terms and the law itself. Intended for the use of the country gentleman, the merchant, and the professional man," 1803. https://repository.library.georgetown.edu/handle/10822/707611

finally, in the federal statute adopted in 1790. The Copyright Clause limited the duration of both copyright and patents, and when the founders wrote "limited times," that limitation historically had been for 14 years.

That original U.S. statute created a 14-year term, with the option of a 14-year extension if the author was still alive. Until 1976, the average copyright term was 32.2 years.[8] Today, the U.S. copyright term is the life of the author, plus 70 years. By contrast, patent terms have changed very little. Today's term for utility patents is either 17 years from patent issuance or 20 years from patent filing, whichever is longer.[9] (The term for design patents, which resemble copyrights in some key respects, is still the original 14 years.) As legal historian Edward Walterscheid puts it, [10] while patents and copyrights were included in the same clause of the Constitution and originally had the same or similar durations, the patent term has increased by just 43 percent while the copyright term has increased by almost 580 percent. Congress must justify why a 20-year term can provide sufficient incentive to inventors, but not to writers and artists.

The Supreme Court has been relatively clear on the ultimate purpose and goals of the Copyright Clause in the Constitution:

> The limited scope of the copyright holder's statutory monopoly...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.[11]

> The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.[12]

Given the purpose of copyright, current term lengths are inconsistent with what the founders had in mind. Alas, the Supreme Court has deferred to Congress to set a term for copyright that is consistent with the Constitution (See U.S. v. Eldred and Golan v. Holder). While the court has noted that infinite copyright clearly would be unconstitutional, they have assessed the current copyright term of life of the author plus 70 years to be, technically, limited.

The court long has held that acts of Congress are "presumptively constitutional."[13] And the presumption of constitutionality given to acts of Congress is "strong." [14] As the court explained in 1953's *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.[15]

This precedent can create something of a vicious circle. 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. Instead, each branch must have a role in interpreting the Constitution.

In 2012 the House Republican Study Committee issued a report on this topic (which I authored), 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. Assessing a law's constitutionality is not the sole dominion of the courts, and it was never intended to be so.

3. Inaction by Congress can validate unconstitutional actions.

4. 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.

5. 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.[16]

8. Lawrence Lessig, "Free Culture: The Nature and Future of Creativity," Chapter 10, Authorama, February 2005. http://www.authorama.com/free-culture-14.html

9. 35 U.S.Code 154 (c) http://www.law.cornell.edu/uscode/text/35/154

10. Edward C. Walterscheid, "To Promote the Progress of Science and the Useful Arts: The Anatomy of a Congressional Power," *IDEA: The Journal of Law and Technology*, 2002.

11. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), cited by Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994)

12. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349–350 (1991), cited by *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994)

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

14. *United States v. Five Gambling Devices Labeled in Part ""Mills," & Bearing Serial Nos. 593-221, 346* U.S. 441, 454, (1953)

15. *Ibid.*

16. Derek Khanna, RSC Policy Brief: Congress's Role and Responsibility in Determining the Constitutonality of Legislation, June 27, 2012, rsc.scalise.house.gov/uploadedfiles/

As the RSC report concluded:

> 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 un-constitutional 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.

But in the context of copyright, in the past century, Congress has abdicated its role of ensuring their legislation on term length is constitutional. 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.[17]

James Madison and other founders referred to copyrights and patents as forms of government-granted "monopoly" and noted that the Constitution had "limited them [monopolies] to two cases, the authors of books, and of useful inventions."[18] While highly skeptical of all such monopolies, Madison argued that these two specific monopolies[19] were justified because they provided an actual community "benefit" and because these monopolies are required to be "temporary." Madison concluded, consistent with British historical and legal tradition, that "under that limitation, a sufficient [recompense] and encouragement may be given," but reiterated that "perpetual monopolies of every sort, are forbidden."

What seems to have been completely forgotten is that Madison ominously warned that all monopolies, including copyright, must be "guarded with strictness [against] abuse." In fact, the founders had historical experience of abuses by those with close connections to the king and knew that grants of monopoly were dangerous if left unrestrained.

The restriction that copyright and patent terms be for "limited times" is textually unique within the Constitution, but it is not the only aspect of the Copyright Clause that is unique. Article 1 Section 8 enumerates the specific powers granted to Congress, but for only one of those powers did the framers specify a purpose. For the Copyright Clause, the founders elaborated that the clause's specific purpose is "to promote the progress of science and useful arts."

The Supreme Court has interpreted this clause, in the context of patents, that "[t]he Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose." Copyright laws, like the patent laws, "by constitutional command" must promote the progress of the sciences and useful arts, "This is the *standard* expressed in the Constitution and it may not be ignored."[20]

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 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." Contributing greatly to this distortion has been the influence of a persistent army of special interest lobbyists, usually representing media companies, rather than the interests of creators and the general public.[21]

In order to restore the original public meaning of copyright, copyright's term must be shortened. 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 (such as the Trans Pacific Partnership Treaty). Finally, copyright terms must not be extended to "life+100" when the next copyright extension bill is expected to come up in 2018.

GUARDING AGAINST ABUSE

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."[22] Historians have cited "anti-monopoly sentiments" as one of the roots of the struggle for American independence.[23] Aversion to monopolies was so strong that several of the original state constitutions even contained provisions condemning the creation of monopolies:

- Maryland Constitution of 1776: "monopolies are odious, contrary to the spirit of free government, and the principles of commerce…and ought not be suffered."

the_role_and_responsibility_of_congress_in_determing_constitutionality_of_legislation.pdf

17. Jerry Brito, et al., "Copyright Unbalanced: From Incentive to Excess," Mercatus Center at George Mason University, Nov. 12, 2012.

18. James Madison, "Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments," circa 1817-1832. http://www.constitution.org/jm/18191213_monopolies.htm

19. Thomas Jefferson, "Letter from Thomas Jefferson to James Madison," Aug. 28, 1789. http://www.founding.com/founders_library/pageID.2184/default.asp

20. *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6, 86 S. Ct. 684, 688, 15 L. Ed. 2d 545 (1966). (However, the Court declined to extend this case in Golan v. Holder (2012), see also Supreme Court Brief, American Association of Law Libraries, Eldred v. Ashcroft, at 6, http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/libraries.pdf.

21. William Patry, "How to Fix Copyright," Oxford University Press USA, January 2012.

22. U.S. Supreme Court, Decision, *Graham v. John Deere*, Feb. 21, 1966. http://supreme.justia.com/cases/federal/us/383/1/

23. Theodore P. Kovaleff, "The Antitrust Impulse: An Economic, Historical, and Legal Analysis, Volume 1," M.E. Sharpe Inc., 1994.

- North Carolina Constitution of 1776: "That perpetuities and monopolies are contrary to the genius of a free state, and ought not be allowed."

It is against this backdrop that one must interpret the Copyright Clause. The British Statute of Anne implemented a copyright term of 14 years, with one renewal term if the author was still alive. Between 1783 and 1786, 12 states enacted general copyright statutes, which were all limited to terms as specified in the Statute of Anne or to a fixed term of 20 or 21 years. All proposals for the Copyright Clause included a temporal limitation.[24]

The temporal limitation and the specific purpose were clearly of importance to the founders, many of whom thought it may not have gone far enough or that the copyright clause would enable monopolies beyond its intended purpose. Virginia delegate George Mason refused to sign the Constitution, fearing that, because of the Copyright Clause, "the Congress may grant monopolies in trade and commerce."[25] According to Edward Walterscheid's account, other attendees at the ratifying conventions shared this fear. Many states proposed amendments indicating their opposition to any further congressional power to establish monopolies.
Until the early 20th century, Congress generally abided by the original public meaning of the Copyright Clause. 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:

> 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.26

The bill report stated that copyright law is "not primarily for the benefit for the author, but primarily for the benefit of the public."

According to the report, "Congress must consider...two questions: First, 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." Congress must use copyright to confer "a benefit upon the public that outweighs the evils of the temporary monopoly." This report was indicative of a large amount of evidence of our historical tradition.

One hundred years later, these widely held sentiments held from the Founding Era to the era 20th century have been forgotten within the Beltway –rather conveniently forgotten. A work written by one of the founders in 1790 would have received at most 28 years of protection, but an Eminem rap song today could receive more than 110 years of protection.

While the Supreme Court has chosen not directly to strike down continual copyright term extension, and instead to defer determining appropriate copyright terms to Congress, their holdings have, at times, clearly enunciated a similar understanding of the history of copyright:

> 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.[27]

The *Sony* decision also cited *Fox Film Corp. v. Doyal* (1932), 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."[28]

Most directly on this point, as Justice Ruth Bader Ginsburg mentioned during oral arguments for the *Eldred* case, "there has to be a limit...Perpetual copyright is not permitted."[29] The founders understood the limit to be very short. Economists argue that it must be short. Alas, the copyright lobby has signaled it doesn't want a limit at all.

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24. Karl Fenning, "The Origin of the Patent and Copyright Clause of the Constitution," *Journal of the Patent Office Society*, 1929. http://heinonline.org/HOL/LandingPage?handle=hein.journals/jpatos11&div=94&id=&page=

25. Jonathan Elliot, "The Debates in the Several State Conventions of the Adoption of the Federal Constitution Vol. 1," 1827. http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1905&chapter=112210&layout=html&Itemid=27

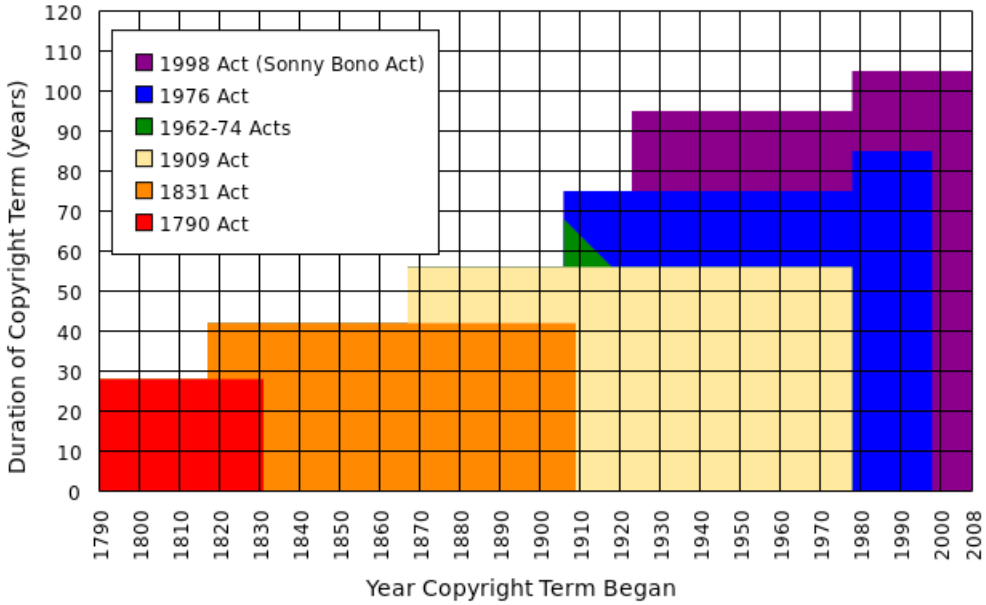
26. Sen. Reed Smoot, R-Utah, "To Amend and Consolidate Acts Respecting Copyright," S. 9440, U.S. Senate Committee on Patents, March 1, 1909. http://books.google.com/books?id=2-RGAQAAIAAJ&dq=%22spirit%20of%20any%20act%20which%20Congress%20is%20authorized%20to%20pass%22&pg=RA2-PA137#v=onepage&q=%22spirit%20of%20any%20act%20which%20Congress%20is%20authorized%20to%20pass%22&f=false

27. U.S. Supreme Court, Decision, *Sony Corp. v. Universal City Studios,* Jan. 17, 1984. https://supreme.justia.com/cases/federal/us/464/417/case.html

28. U.S. Supreme Court, Decision, *Fox Film Corp. v. Doyal*, May 16, 1932. http://supreme.justia.com/cases/federal/us/286/123/;

29. Transcript, *Eldred v. Ashcroft*, 2002. http://www.aaronsw.com/2002/eldredTranscript

FIGURE I: 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. Bell**

* Tom W. Bell, "Copyright Duration and the Mickey Mouse Curve," Agoraphilia, Aug. 5, 2009. http://agoraphilia.blogspot.com/2009/08/copyright-duration-and-mickey-mouse.html

THE COPYRIGHT LOBBY

In recent decades, a number of special interests that Phyllis Schlafly collectively dubbed the "copyright lobby"[30] have ensured that copyrighted works would never enter the public domain. They have done this by fighting continually to lengthen copyright terms. The public policy goals of the copyright inflation movement have been to undermine the Constitution's text and its original public meaning. The recapture of works that otherwise would be in the public domain represents one of the biggest thefts of public property in history, and has had significant impacts upon our culture, personal liberty and economy. The effects of this grand larceny impact learning, creation and innovation.[31]

Current U.S. law provides copyright protection for the life of the author plus 70 years. For corporate authors, the term is 120 years after creation or 95 years after publication. 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. Several times, these extensions have even been made retroactively,[32] re-applying copyright protections to works that already had moved into the public domain. Thus, the degree to which the current "life+70" standard can be relied upon to accurately project when some specific work may move into the public domain is quite limited.

The practical effect of this policy is, effectively, a regime of indefinite copyright.[33] During oral arguments of the 2002 case of *Eldred v. Ashcroft*, Justice Sandra Day O'Connor said of the policy of continual copyright extension that it "flies directly in the face of what the framers had in mind, absolutely."[34] But, Jack Valenti, then-head of the Motion Picture Academy of America, testified during the legislative run-up to passage of 1998's Sonny Bono Copyright Term Extension Act (known colloquially as the "Mickey Mouse Protection Act") that "copyright term extension has a simple but compelling enticement: it is very much in America's economic interests."[35]

Despite such assertions, the MPAA has produced no credible research to back up the claim that extending copyright

30. Phyllis Schlafly, "Copyright extremists shouldn't control information," Townhall.com, Dec. 31, 2001. http://townhall.com/columnists/phyllisschlafly/2002/12/31/copyright_extremists_shouldnt_control_information

31. Ian Hargreaves, "Digital Opportunity: A Review of Intellectual Property and Growth," U.K. Intellectual Property Office, May 2011. http://www.ipo.gov.uk/ipreview-finalreport.pdf

32. Copyright Term Extension Act, Pub.L. 105-298 and the Copyright Act of 1976, Pub.L. 94-553

33. Melville Nimmer, "Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas," Matthew Bender, 1963.

34. Transcript, *Eldred v. Ashcroft*, 2002. http://www.aaronsw.com/2002/eldredTranscript

35. Jack Valenti, Hearing on "Copyright Term, Film Labeling, and Film Preservation Legislation," Subcommittee on Courts and Intellectual Property of the U.S. House Committee on the Judiciary, June 1, 1995.

terms is in the U.S. economic interest, while evidence to the contrary is overwhelming. The extension of copyright, particular to life+50 under the Berne Convention, is a direct result of importing foreign law, with lobbyists arguing for "international harmonization."

When the idea of international harmonization was first presented in the United States, in the 19th century, Congress wisely chose to not to disregard the Constitution's original public meaning of copyright. Mark Twain even testified before Congress in favor of longer copyright terms and importing international law in the form of the Berne Convention, which the United States would end up joining more than a 100 years later. But at the time, Congress rejected Mark Twain's arguments for international harmonization.

Today, given the historical moorings of short copyright terms, the onus is on special interest groups like the Recording Industry Association of America and the MPAA to substantiate their arguments for copyright terms that deviate wildly from our founding tradition.

But instead of substantive arguments, 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. In 1982, Valenti told Congress:

> 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...We are going to bleed and hemorrhage, unless this Congress at least protects [our industry against the VCR]...we 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.[36]

Of course, 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. In 2012, the home media consumption market that the MPAA tried to stamp out blossomed into an $18 billion dollar market.[37] Policymakers should be highly skeptical of the industry's claim that longer copyright terms are in our national interest, as their track record on predictions has been grossly inadequate.

Skepticism of their claims is further substantiated because the steep costs to perpetual extension of copyright have been long known and well documented. This is why the British copyright statute, the Statute of Anne, limited copyright duration to 14 years; why 12 of the original 13 colonies had similar copyright durations in their own statutes; why the Constitution includes the phrase "limited times"; and why the founders limited copyright to 14 years.

In a brief submitted during the *Eldred* case, Nobel laureates Milton Friedman, Ronald Coase, James Buchanan, George Akerlof, Kenneth Arrow and 11 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."[38] 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. As one clear illustration of the costs of extremely long copyright, Warner/Chappell claims a copyright to "Happy Birthday to You," which the Guinness World Records book calls the most famous song in the English language. Due to the copyright claim, every time someone wants to use a portion of this song in a video or performance, they have to pay a license fee or risk being sued.

The Warner/Chappell claim is based upon a published version of piano arrangements from 1935. The authenticity of the claim is under dispute, with some arguing that the song was written earlier and by someone else. Robert Brauneis of George Washington University Law School has argued pretty persuasively that Warner/Chappel 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/Chappel to publicly perform the most famous song in the English language. This discourages some people from performing this song publicly. 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.[39]

Warner/Chappel is a major record label representing Madonna and Michael Jackson's estate, not a fly-by-night operation.[40] So far, they have collected an estimated more

36. 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/

37. Thomas K. Arnold, "Home Entertainment Spending Rises for First Time in Five Years," *Hollywood Reporter*, Jan. 8, 2013. http://www.hollywoodreporter.com/news/home-entertainment-spending-rises-409796

38. George A. Akerlof, et al., "Brief of Economists in Support of Petitioners," *Eldred v. Ashcroft*, May 2002. http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf

39. Rose Desrochers, The Song Happy Birthday to You is Protected by Copyright, www.streetdirectory.com/travel_guide/160274/copywriting/the_song_happy_birthday_to_you_is_protected_by_copyright.html

40. Star Tribune, "NY Suit Filed Over Copyright to 'Happy Birthday to You,' World's Most Famous English Song," June 13, 2013, http://www.startribune.com/entertainment/211469471.html?src=news-stmp

than $2 million annually in licensing fees for the song.[41] According to one estimate, it is the song that earns the highest royalty rates.[42] Under current law, "Happy Birthday to You" will remain under copyright until 2030, but we should expect a push to continue to expand copyright even further beyond 2030.

Justices John Paul Stevens and Stephen Breyer authored separate dissents in the Eldred case, with Breyer noting the increased royalty payments that result from copyright term extension "will not come from thin air."

> Rather, they ultimately come from those who wish to read or see or hear those classic books or films or recordings that have survived…Further, the likely amounts of extra royalty payments are large enough to suggest that unnecessarily high prices will unnecessarily restrict distribution of classic works (or lead to disobedience of the law)—not just in theory but in practice.[43]

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.[44]

COSTS OF EXCESSIVE COPYRIGHT DURATION

It may be difficult to conceptualize the drawbacks of keeping older works under copyright perpetually. However, the founders understood these costs and how keeping older content behind a locked vault affects creativity in a number of ways. 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. Such monopolies unquestionably were recognized as restricting freedom.

Copyrights and patents continue to act, in some ways, as restrictions upon creation, speech and personal liberty.45 Under the Constitution, those restrictions are justified on grounds that they are necessary to provide incentives for creative genius, but they remain restrictions nonetheless. It is precisely because they are restrictions, authorized and created by the government, that the founders called them monopolies.

This report does not argue that copyright should be abolished, but the founders were clear that these monopolies had associated costs. Policy-makers want there to be incentive for content creation and some artistic works would never have been created without the ability to profit from those works. But we must also acknowledge that, at a certain point, there is no more cognizable additional incentive to extending copyright terms. It is thus an equation with two sides: no copyright is too little incentive while the current regime of copyright for life+70 provides incentives whose value is exceeded by the monopoly's costs. The most beneficial copyright term is somewhere in between those extremes, and we believe it is closer to the copyright laws enacted by our founders.

Acknowledging the costs of excessively long copyright is critical to understanding why copyright must expire – not merely because that is what the Constitution prescribes, but because it is good policy.[46]

Historical works – *Eyes on the Prize* 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. The director, Jon Else, has said that "it's not clear that anyone could even make 'Eyes on the Prize' today because of rights clearances."[47]

The problems facing *Eyes on the Prize* are a result of muddied and unclear case law on fair use, but also copyright terms that have been greatly expanded. If copyright terms were 14 years, or even 50 years, 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

41. Brauneis, Robert, Copyright and the World's Most Popular Song (October 14, 2010). 56 Journal of the Copyright Society of the U.S.A. 335 (2009) ; GWU Legal Studies Research Paper No. 392. Available at SSRN: http://ssrn.com/abstract=1111624 or http://dx.doi.org/10.2139/ssrn.1111624

42. Mike Masnick, "Lawsuit Filed to Prove Happy Birthday Is In the Public Domain; Demands Warner Pay Back Millions of License Fees," July 13, 2013, https://www.techdirt.com/articles/20130613/11165823451/filmmaker-finally-aims-to-get-court-to-admit-that-happy-birthday-is-public-domain.shtml

43. Justice Stephen Breyer, dissenting opinion, *Eldred v. Ashcroft*, 2002. http://www.copyright.gov/docs/eldredd1.pdf

44. Derek Khanna and John Tehranian, "Comments on Department of Commerce Green Paper, 'Copyright Policy, Creativity, and Innovation in the Digital Economy,'" National Telecommunications and Information Administration, Nov. 11, 2013. http://www.ntia.doc.gov/files/ntia/khanna_-_tehranian_comments.pdf

45. Tom W. Bell, "Copyright as Intellectual Privilege," *Syracuse Law Review*, 2007. http://tomwbell.com/writings/%28C%29asIntellectualPrivilege.pdf

46. 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

47. Nancy Ramsey, "The Hidden Cost of Documentaries," *New York Times*, Oct. 16, 2005. http://www.nytimes.com/2005/10/16/movies/16rams.html?pagewanted=print&_r=0

entirety in any other form. In 1999, CBS was sued for using portions of the speech in a documentary. It lost on appeal before the 11th Circuit.48 If copyright terms were shorter than 50 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+70" to motivate him to write the "I Have a Dream" speech. (Among other reasons, because the term length was much shorter at the time.) He wrote the speech because of the March on Washington and because he hoped to inspire Congress to pass civil rights legislation. He 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.[49]

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." Further, King's speech itself built upon other works, referencing the Bible, the Gettysburg Address, "My Country, 'Tis of Thee" and William Shakespeare. The speech would not exist, at least not in any form that would be recognizable to us, without the ability to build on the works of others. Generations of these historical artifacts now lay fallow behind locked vaults of copyright.

Orphan works – The mass epidemic of "orphan works" is largely a result of excessively long copyright terms.[50] What's more, orphan works clearly demonstrate how copyright can act as a restraint on personal liberty and content creation.

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. As defined by the U.S. Copyright Office:

> [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.[51]

The prevalence of orphan works creates a number of problems for the content industry.[52] If you can't track down who owns rights in the work, you can't use the work. As the Copyright Office explains:

> 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.

This problem was nearly nonexistent when copyright terms were shorter, but the perpetual extension of copyright has rendered large quantities of content unreproducible. 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 the limits on personal liberty when individuals can't reproduce or remix these works.

This self-inflicted wound has real-world consequences. The BBC has one million hours of programming in its archives that are unusable because the rights holders are unknown.[53] British museums hold 17 million photographs, of which 90 percent lack rights-holder identification.[54]

There are fewer hard statistics on the number of orphan works in the United States, but the problem is believed to affect millions of works. Carnegie Mellon University Libraries submitted a filing to the Copyright Office last year explaining that, when they tried to digitize and provide web-based access for their collection, 22 percent of the publishers could not be found.[55] Google Books digitizes a large amount of the world's books. Alas, for many older works, it is extremely costly or impossible for them to track down the rightful owner of the work.

As the Copyright Office concluded in 2006, "the orphan works problem is real" and "legislation is necessary to pro-

48. Decision, *King v. CBS*, 11th Circuit Court of Appeals, 1999. http://www.law.cornell.edu/copyright/cases/194_F3d_1211.htm

49. However, it should be noted that King 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.

50. William Patry, "How to Fix Copyright," Oxford University Press USA, January 2012.

51. U.S. Register of Copyrights, "Report on Orphan Works," January 2006. http://www.copyright.gov/orphan/orphan-report-full.pdf

52. David J. Kappos, "Letter to Maria A. Pallante, Register of Copyrights," U.S. Copyright Office, January 2013.

53. U.K. Department for Culture, Media and Sport, "Digital Britain: Final Report," June 2009. http://www.official-documents.gov.uk/document/cm76/7650/7650.pdf

54. HM Treasury, "Gowers Review of Intellectual Property," December 2006. http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf

55. Denise Troll Covey, "Response to Library of Congress NOI on Orphan Works and Mass Digitization," Carnegie Mellon University, Jan. 1, 2013.

vide a meaningful solution to the orphan works problem as we know it today."[56] The legislation that would best fix the problem is to have significantly shorter copyright terms, as William Patry, author of one of the leading treatises on copyright law, argues persuasively in "How to Fix Copyright."[57]

In 2012, the Library of Congress, while noting the arguments in favor of copyright extension, explains that "extend[ing] the duration of copyright…increased the likelihood that some copyright owners would become unlocatable." And the "net result" of copyright extension "has been that more and more copyright owners may go missing."[58]

The issue of orphan works likely would have been alien to the founders. In addition to the much shorter 14-year term, copyrights had to be registered with the Library of Congress, who would keep a copy. While the founders allowed copyright holders one renewal term, for a maximum term of 28 years, without an affirmative action to renew, a work automatically would enter the public domain. Thus, every work that could be under copyright would have had a paper trail to track down 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 is that millions of works cannot be used (according to one study on books, including more than 25 percent of 20th century publications[59]) because the owner cannot be identified or located. As the Library of Congress's 2012 report explains:

> "This outcome [being unable to use a large number of works] is difficult if not impossible t o reconcile with the objectives of the copyright system and may unduly restrict access to millions of works that might otherwise be available to the public (e.g., for use in research, education, mainstream books, or documentary films). Accordingly, finding a fair solution to the orphan works problem remains a major goal of Congress and a top priority for the Copyright office."

Digital archiving – Leading experts on digital archiving agree that copyright concerns are the single most significant barrier to preserving our cultural heritage.[60] In 1930, 10,027 books were published in the United States. In 2001, all but 174 of these titles are out of print. But for the Sony Bono Copyright Extension, digital archives could be made of remaining copies of the 9,853 works not currently being published. But under CTEA, and with likely future term extensions, digital archivists "must continue to wait, perhaps eternally, while works disappear and opportunities vanish."[61]

As one example, the early volumes of periodicals such as the *New Yorker, Time* magazine and *Reader's Digest* "provide an unparalleled window into early 20th century American life and culture [but] few if any of these works can be found online because they are still under copyright. Until they fall into the public domain, the process of clearing rights for each article, drawing, and photograph makes digital archiving of such composite works practically impossible."[62]

But surely, libraries can buy copyrighted books to preserve them, can't they? Unfortunately, this option is vastly insufficient. Many published books are not available for sale and libraries are fiscally and spatially constrained. The combined archives of public research libraries in the United States hold approximately 600 million titles, only a small percentage of the world's published works over the past 200 years.[63]

In a Supreme Court brief filed by librarians, they explained that the most recent copyright extension, the CTEA:

> …effectively prohibits non-copyright owners – like librarians, curators, archivists, historians, and scholars – from republishing and disseminating older works that may have no significant commercial value, but may be of strong historical or artistic interest…The public ultimately pays for these harms by restricted and/or more expensive access to older works, and by inhibitions on scholarship, teaching, and the creation of new works.[64]

The D.C. Circuit Court recognized in *Eldred v. Reno* that "[p]reserving access to works that would otherwise disappear. . . 'promotes Progress.'"[65]

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56. U.S. Register of Copyrights, "Report on Orphan Works," January 2006. http://www.copyright.gov/orphan/orphan-report-full.pdf

57. William Patry, "How to Fix Copyright," Oxford University Press USA, January 2012.

58. Copyright Office, Orphan Works and Mass Digitization, 77 Fed. Reg. 64555 (Oct. 22, 2012)

59. See Michael Cairns, 580, 288, *Orphan Works – Give or Take, Personanondate*, http://personanondata.blogspot.com/2009/09/580388-orphan-works-give-or-take.html (Sept. 9, 2009).

60. See citing Panel on Digital Libraries, Pres. Info. Tech. Advisory Comm., Digital Libraries: Universal Access to Human Knowledge 21 (2001), available at <http://www.ccic.gov/pubs /pitac/pitac-dl-9febOl.pdf> (accessed Nov. 13, 2002; copy on file with Journal of Appellate Practice and Process); Michael Lesk, Practical Digital Libraries. Books, Bytes and Bucks 223 (Morgan Kaufman 1997) ("Issues related to intellectual property law are the most serious problems facing digital libraries.").

61. *Id. At 459.*

62. *Id. At 460*

63. Nat]. Ctr. for Educ. Statistics, Academic Libraries: 1998 tbl. 5A (Off. of Educ. Research & Improvement, U.S. Dept. of Educ 2001) (providing total number of paper volumes: 878,906,177; total number of paper titles: 495,724,813; total number of microform units: 1,062,082,077; total number of electronic titles: 3,473,225, and total number of audio-visual materials-units: 92,305,707), available at <http://nces.ed.gov/pubs 2001/2001341.PDF> (accessed Nov. 13, 2002; copy on file with Journal of Appellate Practice and Process).

64. Brief for libraries at 4, US v. Eldred.

65. Eldred v. Reno, 239 F.3d 372, 379 (D.C. Cir. 2001)

Derivative works – Current copyright terms also inhibit music creation and derivative works. I recently interviewed DJ Earworm, a major performing mash-up artist, who explained how modern copyright terms are part of the problem that electronic and hip-hop music producers face. He explained that, if copyright terms were shorter (such as the original 14 years, or even the 32.2 years that was the average before 1976) producers would benefit enormously from the ability to freely sample music all of that additional content, helping hip-hop and mash-up artists alike. As even the Congressional Research Service has concluded:

> [E]ven if the owners ultimately do not require any payment, the process of seeking multiple permissions for some media (such as photographs) can be prohibitive. The elimination of transaction costs when copyrights expire is a net benefit to the economy, if all other things (such as creative incentives) are equal.[66]

If exorbitantly long copyright terms stifle content creation and distribution – such as limiting promotion of Martin Luther King's speech, limiting distribution of a documentary on the civil rights movement and hurting hip-hop and other new artists – then Congress must work to restore the original intent of the Constitution's Copyright Clause.

TRANSACTION COSTS

Judge Richard Posner, a Reagan appointee and the most-cited legal jurist of the 20th century, has called the perpetual lengthening of copyright terms "the most serious problem with copyright law."[67] In "The Economic Structure of Intellectual Property Law," Posner explains some of the problems with the extension:

1. Tracing 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 materially affected if...lucrative new markets for copyrighted work, unforeseen when the work was created, emerged.[68]

As Posner notes, tracing costs may be a significant barrier. The tracing costs occur because it's difficult for people to figure out which works are in the public domain or under copyright. And if under copyright, it remains unclear whom to contact and how much to pay to license the material. Works published before 1923 are in the public domain, but works between 1923 and 1964 are in a potential grey area, often depending on whether the author renewed the copyright. The only official records of renewal are held by the Copyright Office in Washington, DC; however, for records before 1978 they are not available online.

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 either undertake research using the paper card catalogs or pay the office $165 an hour to search the record.[69] Even if one figures out who registered the work, when it was filed and whether it was renewed, it sometimes may still be legally complex to determine if the work is under copyright or in the public domain. Cornell University[70] helped by putting together a complicated chart to help one determine the status of a work, but as one of the creators of the chart explains: "Even 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 percent certainty that a work has risen into the public domain." The co-creator wrote a 3,600-word guide to supplement the chart and help one decide if a work is in the public domain or not.[71] Some of the fact patterns become so complicated that they are often on final exams for copyright law courses. This lack of clarity in the law further increases transaction costs.

Depressing volume of publicly available content – Judge Posner identifies that, of 10,027 books published in United

66. Edward Rappaport, "Copyright Term Extension: Estimating the Economic Values," Congressional Research Service, May 11, 1998. http://assets.opencrs.com/rpts/98-144_19980511.pdf

67. Richard Posner, "Do patent and copyright law restrict competition and creativity excessively," The Becker-Posner Blog, Sept. 30, 2012. http://www.becker-posner-blog.com/2012/09/do-patent-and-copyright-law-restrict-competition-and-creativity-excessively-posner.html

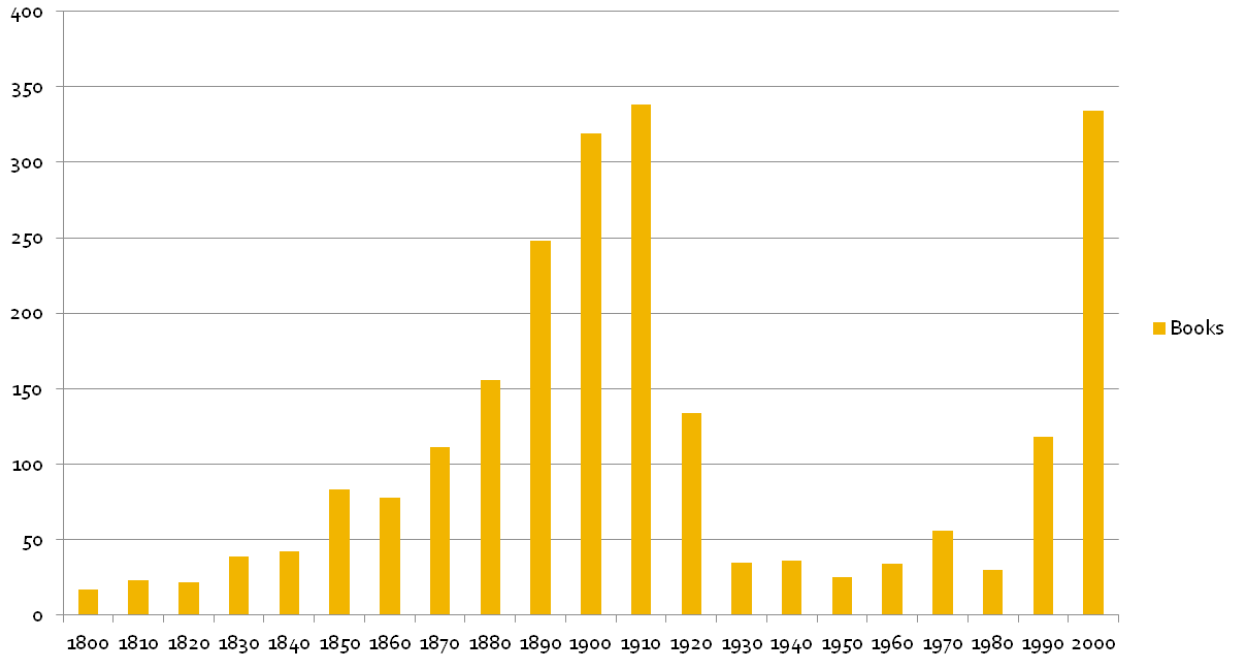
68. Richard Posner and William Landes, "The Economic Structure of Intellectual Property Law," p. 213, Harvard University Press, June 30, 2009.

69. Teri Karobonik, "The Public Domain: Now Available for Only $165 An Hour," (July 16, 2013), https://www.techdirt.com/articles/20130715/16484023809/public-domain-now-available-only-165-hour.shtml

70. Cornell University, "Copyright Term and the Public Domain in the United States," January 2014, http://copyright.cornell.edu/resources/publicdomain.cfm.

71. Peter B. Hirtle, "When is 1923 Going to Arrive and Other Complications of the U.S. Public Domain," (September 2012), http://www.infotoday.com/searcher/sep12/Hirtle--When-Is-1923-Going-to-Arrive-and-Other-Complications-of-the-U.S.-Public-Domain.shtml

FIGURE 2: NEW BOOKS FROM AMAZON WAREHOUSE BY DECADE



SOURCE: Paul Heald

States in 1930, only 174 were still in print in 2001 (a rate of 1.7 percent). Based on similar data for other mediums, older works are often completely unavailable to the consumer, scholar and new content creator looking to build on their legacy.

The copyright lobby sometimes counters that a "public domain work is an orphan." The previous head of the MPAA, Jack Valenti, explained that "[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."[72] The head of the RIAA explains that "there is all but zero value to a record company in a public domain recording."[73] The Institute for Policy Information, an MPAA-funded organization,[74] 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."[75]

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."[76] Considering the founders' copyright regime had a 14-year term, required registration and didn't apply to foreign works, that's an awful lot of "legal piracy" they permitted.

The 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). What's more, the data establishes firmly that the claim is 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. In fact, works are significantly more available once they enter the public domain.

A 2012 review of books sold through Amazon showed that those published after the critical public domain cut-off date of 1923 are available at a dramatically lower rate than books

72. Jack Valenti, "A Plea For Keeping Alive the U.S. Film Industry's Competitive Energy," Hearings on S. 483 Before the Senate Judiciary Committee, 104th Congress, Sept. 20, 1995. http://www.peteryu.com/inttrade/valenti.pdf

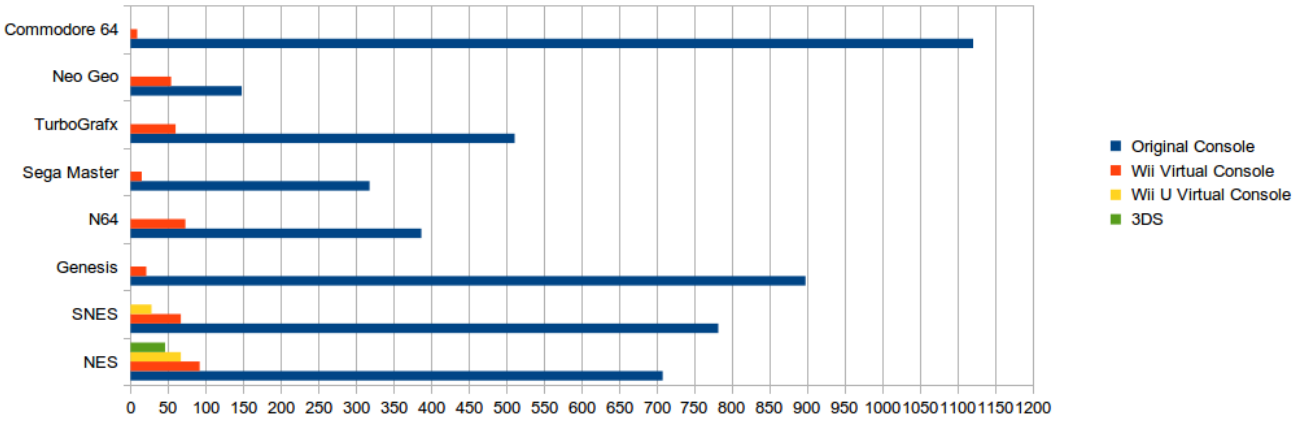
73. Head of RIAA Jennifer Pariser, cited Federal Copyright Protection for Pre-1972 Sound Recording Report of the Register of Copyrights (December 2011), at 102, http://www.copyright.gov/docs/sound/pre-72-report.pdf

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

75. 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

76. Stephen K. Rush, "Brief of Amici Curiae of the Nashville Songwriters Association International in Support of Respondent," *Eldred v.Ashcroft*, May 20, 2002. http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/opp-amici/nashville.pdf

FIGURE 3: CLASSIC GAMES AVAILABLE BY CONSOLE



SOURCE: Zachary Knight

from the prior century.77 This is what The Atlantic magazine has referred to as "The Missing 20th Century."[78] The spike in availability starts right after works enter the public domain. 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.

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.79 The creation of audiobooks where none existed is clear evidence of the market "taking care of the content" and "promoting distribution" with or without a clear financial motive (public domain books often are sold at low cost in print and websites that host public domain works can be supported by advertising).

The content industry's claim 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 is itself doing a good job investing in the commercialization, availability and preservation of older copyright works.

A recent study by the Library of Congress demonstrates the industry has done an extremely poor job of preserving older films. Of the nearly 11,000 silent feature films made from 1912 through 1929, the survey found only about 3,311 are known to exist today and only 1,575 exist in their original 35 millimeter release format. The rest survive in foreign versions, are incomplete or are in lower-quality formats. This means only about 14 percent of Silent Era films survived in their original form, and even those may not be in good quality today.

One under-acknowledged aspect of this loss of accessible culture can be seen in access to older video games. Video games have never entered the public domain, because they have only existed in an era that has seen regular copyright extensions. But because video game generations move so quickly, one can see easily how older artistic works quickly become unavailable to the general public because of excessively long copyright terms.

Because gamers have received a new game console every six years or so, and most game consoles have limited or no backwards compatibility, it creates a real problem where older games are not just unavailable for the general public to buy commercially, but older games may not necessarily be easy to play, because the console itself may be difficult to acquire and maintain. 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).

Zachary Knight produced a small sample study[80] on game availability and what he found was that Nintendo's Virtual Console doesn't even scratch the surface of the classic games:

77. Paul Heald, "Do Bad Things Happen When Works Fall Into the Public Domain," talk at the University of Canterbury, March 16, 2012. http://www.youtube.com/watch?v=-DpfZcftI00

78. Rebecca Rosen, "The Missing 20th Century: How Copright Protection Makes Books Vanish," March 30, 2012, http://www.theatlantic.com/technology/archive/2012/03/the-missing-20th-century-how-copyright-protection-makes-books-vanish/255282/

79. Paul Heald and Christopher Buccafusco, "Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension," *Berkeley Technology Law Journal,* Aug. 15, 2012. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2130008

80. Zachary Knight, "Extended Copyrights in Games Means a Loss of Culture for Gamers," Gamasutra.com. Feb. 4, 2014. http://randomtower.com/2014/02/extended-copyrights-in-games-means-a-loss-of-culture-for-gamers/

While consumers cannot legally access the vast majority of these older games, many are finding ways around legal restrictions through the use of emulators that allow them to play essentially any older game illegally. These emulators are extremely popular to access games that cannot otherwise be played legally. As Mr. Knight concludes:

> 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 dearth 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.

An amicus brief filed by intellectual property law professors in the *Eldred* case makes the point eloquently:

> In 1895, [H. G. Wells] published *The Time Machine* as his first novel...Wells went on to write and publish 13 further novels and numerous short stories. He died in 1946, the novel entered the public domain in 1951. Since that date, it has been continuously in print. Later authors have adapted *The Time Machine* in a variety of formats, including sequels, films, comic books, musicals, a ballet and a video game. Since 1992, the full text of *The Time Machine* has been available on the Internet via Project Gutenberg... Wells' 1933 novel *The Shape of Things to Come* [had a copyright] originally scheduled to expire in 1989 [but] was extended for an additional 19 years by the 1976 Copyright Act, and extended again for another 20 years by the Sonny Bono Copyright Term Extension Act. The copyright [will remain] until 2028 – 12 years after the novel enters the public domain in Europe. In the United States, *The Shape of Things to Come* is out of print."[81]

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. What would modern culture be without the ability to build upon older works?

How many plays from the 1920s, 1930s and 1940s have high schools had to pay large fees to license and reproduce? Certainly those plays are not too old for literary and cultural value. Under a shorter copyright term, as the founders intended, written music from that era would be available to anyone for free with the click of a button, rendering most of the early jazz movement in the public domain. Would schools not be more likely to have jazz clubs for students if most of the music could be printed for free? There should be an accounting for the lost opportunities to educate and inspire, due to excessively long copyright terms

A number of orchestras have stopped performing *Peter and the Wolf*, by Prokofiev, because when the work returned to copyright protection after having been in the public domain, the cost of sheet music became prohibitive. In a survey by the Conductors Guild, 83 percent of orchestral conductors have a general practice of conserving resources by limiting their performances and recordings of copyrighted works.[82] About 70 percent said they are no longer able to perform some works previously in the public domain, because those works are now under copyright protection.

Peter Decherney, a professor of cinema studies at the University of Pennsylvania, explained in a 2011 op-ed the impact of copyright extension and removing works that previously were in the public domain (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.
>
> ...More 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...The MPAA contends that the expansion of copyright is good for its industry...But history tells a different story. Filmmakers have consistently used public domain works to anchor artistic and technological innovation.[83]

81. Jonathan Weinberg, et. al. "Brief of Intellectual Property Law Professors as Amici Curiae Supporting Petitioners," U.S. Court of Appeals for the District of Columbia Circuit. http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/ip-lawprofs.pdf

82. Steven A. Hirsch, "Brief of the Conductors Guild and the Music Library Association," *Golan v. Holder*, June 20, 2011. http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-545_petitioneramcuconductors-guild.authcheckdam.pdf

83. Peter Decherney, "Will Copyright Stifle Hollywood," *New York Times,* Oct. 4, 2011. http://www.nytimes.com/2011/10/05/opinion/keep-works-in-the-public-domain-public.html?_r=2&hpw

TABLE I: MAJOR DISNEY FILMS BASED ON PUBLIC DOMAIN WORKS

FILM	YEAR	SOURCE	YEAR	ADJUSTED DOMESTIC GROSS ($M)	ALL-TIME RANK
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 Villeneuve'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

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. Many who watched DreamWorks' "Shrek" series may not 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.

PUBLIC DOMAIN CONTENT BENEFITS SOCIETY

Sometimes, the repackaging of older works includes not just a character, but an entire storyline. The Motion Picture Patents Co., 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.[84] Most of the Grimms' fairy tales were first published in 1812, with the last edition produced in 1857. More than 100 years later, when the Grimms' work 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." "Sleeping Beauty" from 1959 was based upon a 262-year-old folk tale published by Charles Perrault in 1697.

"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."[85] In fact, three previous versions of Snow White already had been created by 1937, and Disney himself remembered having seen the work performed while growing up in Kansas City.[86]

Under the current copyright regime, 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):

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

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"

84. Peter Decherney, "Hollywood's Copyright Wars: From Edison to the Internet"

85. Supreme Court Brief of Peter Decherney, Golan v. Holder, at 17. http://decherney.org/decherney/home_files/10-545%20tsac%20Peter%20Decherney.pdf

86. Quote of Walt Disney in Neal Gabler, Walt Disney: A Triumph of American Imagination at 216 (2006).

(1908); Jack London's "White Fang" (1906); and Edgar Rice Burroughs' "Tarzan of the Apes" (1914) and "A Princess of Mars" (1917).

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. 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."[87]

The Disney Corp., of course, added their own secret sauce, but the data shows that even 262-year-old story-lines (not to mention earlier works, like Aesop's Fables and the Greek myth of Hercules) easily can be translated to the modern 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 (see "Fantasia," using classical compositions from Bach and Beethoven). Further, the original Mickey Mouse short film, "Steamboat Willie," was itself a parody of Buster Keaton's "Steamboat Bill Jr." A parody is a form of fair use that builds upon the works of others.

Under current policy, there will never be another Disney Corp., because the availability of new materials to use from the public domain essentially stopped in the 1930s. While Disney took and reused from the public domain, none of the works created by Disney, including derivative works based upon public domain works, has entered the public domain for others to build upon. If current policy is extended, they never will.

The content industry has argued that copyright represents their natural right to property. 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.[88] 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.[89]

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.[90]

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 85 percent of all works under copyright in 1984 would have entered the public domain by Jan. 1, 2012.[91] 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:

> Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each creator building on the works of those who came before. Overprotection stifles the very creative force it's supposed to nurture.[92]

Judge Kozinski added that these "rights aren't free: They're imposed at the expense of future creators and of the public at large." 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." 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." The shrinking of the future public

87. Amicus Brief at 17. http://decherney.org/decherney/home_files/10-545%20tsac%20Peter%20Decherney.pdf

88. Derek Slater, "An Interview with Jack Valenti," cmusings, Feb. 3, 2003. http://cmusings.blogspot.com/2003_02_02_cmusings_archive.html#88495460

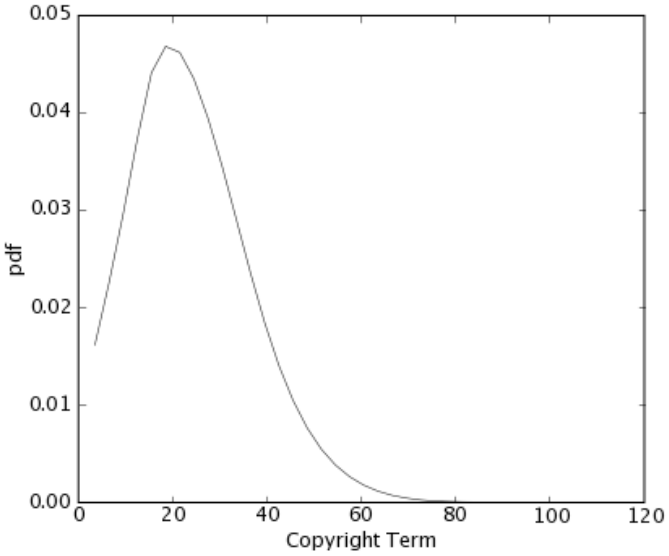
89. Statement of Rep. Marsha Blackburn, "Fair Use: Its Effects on Consumers and Industry," House Energy and Commerce Committee, Subcommittee on Commerce, Trade, and Consumer Protection, Nov. 16, 2005. http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg27003/html/CHRG-109hhrg27003.htm

90. Amicus Brief at 7, http://decherney.org/decherney/home_files/10-545%20tsac%20Peter%20Decherney.pdf

91. Christopher Sprigman, "Copyright and the Rule of Reason," University of Virginia Law School Public Law and Legal Theory Working Paper Series, 2009. http://law.bepress.com/cgi/viewcontent.cgi?article=1207&context=uvalwps&sei-redir=1&referer=http%3A%2F%2Fscholar.google.com%2Fscholar%3Fq%3DChristopher%2BSprigman%252C%2BReform%2528aliz%2529ing%2BCopyright%252C%2B57%2BSTAN.%2BL.%2BREV.%2B485%2B%25282004%2529%26btnG%3D%26hl%3Den%26as_sdt%3D1%252C9#search=%22Christopher%20Sprigman%2C%20Reform%28aliz%29ing%20Copyright%2C%2057%20STAN.%20L.%20REV.%20485%20%282004%29%22

92. Alex Kozinski, "Dissent in White v. Samsung Electronics of America, Inc.," U.S. Court of Appeals for the Ninth Circuit, March 18, 1993. http://notabug.com/kozinski/whitedissent

FIGURE 4: OPTIMAL LENGTH OF COPYRIGHT TERMS



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

*SOURCE: Rufus Pollock**

*Ibid

domain is a big deal because, as Peter Decherney notes in his amicus brief:

> 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 built-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.[93]

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

93. Amicus Brief at 6-7, http://decherney.org/decherney/home_files/10-545%20tsac%20Peter%20Decherney.pdf

OPTIMAL LENGTH OF COPYRIGHT TERMS

There have been several studies on how long copyright terms should be, and all have concluded that our current term lengths are counter-productive for their intended purpose. Even the Congressional Research Service concluded the added incentive to create new works provided by a 20-year extension to the term of copyright was small compared to existing incentives.[94] A study from Cambridge University found the optimal copyright term is around 15 years and found with 95 percent certainty that the optimal term of copyright should be less than 30 years.95 As a reminder, current copyright terms are life of the author plus 70 years or for works made for hire. For corporate rights-holders, the copyright term is 95 years from first publication or 120 years from creation.

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+70" term and a "life+50" term.

In 2003, the *Economist* magazine ran an editorial arguing for a 14-year copyright term, noting:

> Copyright was originally the grant of a temporary government-supported monopoly on copying a work, not a property right...Starting from scratch today, no rational, disinterested lawmaker would agree to copyrights that extend to 70 years after an author's death, now the norm in the developed world.[96]

In 2009, Professors Ivan Png and Qiu-hong Wang analyzed the production of films, books and movies in 19 OECD countries that, at various points between 1991 and 2005, had extended the statutory terms of copyright. Their research demonstrated no evidence that the longer term of caused the creation of more works than the previous shorter term.[97] Given that we know the harm of longer terms, if there is no evidence of benefit, then 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. Their report included many well-received proposals for reform-

94. Edward Rappaport, "Copyright Term Extension: Estimating the Economic Values," Congressional Research Service, May 18, 1998. http://assets.opencrs.com/rpts/98-144_19980511.pdf

95. Rufus Pollock, "Forever Minus a Day? Some Theory and Empirics of Optimal Copyright," Cambridge University, Aug. 7, 2007. http://rufuspollock.org/papers/optimal_copyright.pdf

96. Editorial, "Copyrights: A radical rethink," *The Economist*, Jan. 23, 2003. http://www.economist.com/node/1547223

97. I.P.L Png and Qiu-hong Wang, "Copyright Law and the Supply of Creative Work: Evidence from the Movies," IP Academy of Singapore, April 2009. www.comp.nus.edu.sg/~ipng/research/copyrt.pdf.

ing the copyright system, and the leader of this project testified before Congress in 2013 to present their findings. That report noted:

> ...most CPP members believe that the duration of copyright nowadays is longer than is needed to achieve the normative goals of a good copyright regime, and indeed, that the overlong duration of copyright is impeding some important goals of the copyright regime. The switch to a life-plus-years model and the 20-year extension have contributed, for example, to a growing societal problem; namely, those wishing to license older works often cannot locate the rights holder even after a reasonably diligent search (often referred to as the "orphan works" problem). This problem inhibits appropriate reuses of older works that may be important to preserve as part of our cultural heritage.[98]

In November 2012, the House Republican Study Committee offered a proposal (which I authored) for copyright terms that would start out as free, but would gradually grow to require a larger fee and would terminate after 46 years. 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 (at a cost of 1 percent of all U.S. revenue from first 12 years – which equals all sales).

C. Elective six-year renewal (costing 3 percent of revenue from the previous 12 years).

D. Elective six-year renewal (costing 5 percent of revenue in previous 6 years).

E. Elective 10-year renewal (costing 10 percent of ALL overall revenue – minus fees paid so far).[99]

This proposal would terminate all copyright protection after 46 years.

The report was generally well received, particularly by conservative and libertarian organizations. The American Conservative Union featured it on their front page.[100] *The American Conservative* magazine wrote that the report "would be a heck of a start towards making copyright actually incentivize innovation, rather than stifling it, as it most often does today."[101] *Businessweek*'s endorsement was titled, "Here's How Republicans Can Show They're Serious About Free Markets."[102] Tim Carney of the *Washington Examiner*[103] noted "if Republicans took on this issue, they could make a play for younger voters while fighting for free enterprise." *The New York Times*' two lead conservative voices, David Brooks[104] and Ross Douthat,[105] each positively cited the report. The *Wall Street Journal* had an op-ed by James Panero calling for shorter copyright terms, which noted that "considering the Democratic Party's ties to Hollywood, Republicans should be the natural leaders on intellectual property reform."[106]

The reaction among conservative blogs was, if anything, even more positive. *RedState* wrote "it's hard to find a real reason to oppose it [and] the proposed new policies make sense."[107] Law professor Randy Barnett, lead constitutional scholar on the conservative challenge to the Affordable Care Act, wrote a post in favor of the proposals.[108] Glenn Reynolds featured the report on *Instapundit*.[109]

Since the RSC report, there has been more serious consideration of copyright term reform on several fronts. On March 20, 2013, the registrar of copyrights and director of the U.S. Copyright Office, Maria Pallante, endorsed considering shortening the copyright term, at least from "life+70" to "life+50." And the Department of Commerce recently pub-

98. Pamela Samuelson, *The Copyright Principles Project: Directions for Reform*, 25 *Berkeley Tech. L.J.* 1175 (2010),
Available at: http://scholarship.law.berkeley.edu/facpubs/563

99. Derek Khanna, "RSC Policy Brief: Three Myths About Copyright Law and Where to Start to Fix It," Republican Study Committee, Nov. 16, 2012. http://www.publicknowledge.org/files/withdrawn_RSC_Copyright_reform_brief.pdf

100.Ezra Klein, "Derek Khanna wants you to be able to unlock your cellphone," *Washington Post,* March 9, 2013 http://www.washingtonpost.com/blogs/wonkblog/wp/2013/03/09/derek-khanna-wants-you-to-be-able-to-unlock-your-

101.Jordan Bloom, "An Anti-IP Turn for the GOP?," *The American Conservative,* Nov. 16, 2012. http://www.theamericanconservative.com/ cell-phone/an-anti-ip-turn-for-the-gop/

102.Brendan Greeley, "Here's How Republicans Can Show They're Serious About Free Markets," *BloombergBusinessweek*, Nov. 21, 2012. http://www.businessweek.com/articles/2012-11-21/heres-how-republicans-can-show-theyre-serious-about-free-markets.

103.Tim Carney, "GOP Sides with Mickey Mouse on Copyright Reform," *Washington Examiner,* Dec. 5, 2012. http://washingtonexaminer.com/gop-sides-with-mickey-mouse-on-copyright-reform/article/2515183.

104.David Brooks, "The Conservative Future," *New York Times*, Nov. 19, 2012. http://www.nytimes.com/2012/11/20/opinion/brooks-the-conservative-future.html

105.Ross Douthat, "What is Reform Conservatism," *New York Times*, May 30, 2012. http://douthat.blogs.nytimes.com/2013/05/30/what-is-reform-conservatism/

106. James Panero, "Sorry, Writers, but I'm Siding With Google's Robots," *The Wall Street Journal*, Feb. 7, 2014. http://online.wsj.com/news/articles/SB10001424052702304428004579352643414172168

107.Neil Stevens, "The RSC should not have pulled the copyright paper," *RedState*, Nov. 20, 2012. http://www.redstate.com/2012/11/20/the-rsc-should-not-have-pulled-the-copyright-paper/

108.Randy Barnett, "House GOP Carries Water for Big Media," *The Volokh Conspiracy*, Dec. 6, 2012. http://www.volokh.com/2012/12/06/house-gop-carries-water-for-big-media/.

109.Glenn Reynolds, "Forget the Fiscal Cliff: How About Copyright Reform," Instapundit.com, Nov. 21, 2012. http://pjmedia.com/instapundit/158150/

lished a green paper about the need for some updates to U.S. copyright law, including addressing orphan works.

The disparity between the founders' copyright of 14 years and modern copyright terms that last longer than anyone could ever be alive, is particularly glaring to modern audiences. This is because there has been more research on the cost of these ridiculously long terms, but also because today everyone is a content creator in a way that average people were not in the early 20th century. Justifying why our personal e-mails, Facebook posts and tweets should be protected under copyright for our lifetimes plus 70 years doesn't seem to meaningfully fulfill the constitutional mandate of promoting the progress of the sciences.

Further, social norms on those forms of creation differ extremely far from what the law is. Of course, this does not 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. However, under many readings of the copyright statutes, your e-mails are copyrighted and forwarding an e-mail without permission, especially if the e-mail says not to forward it, could be copyright infringement, making one liable for a $150,000 fine.

Tom W. Bell's new book, "Intellectual Privilege: Copyright, Common Law, and the Common Good," makes a compelling case for restoring the copyright term to 14 years, with a potential 14-year extension if the author is still alive. As he explains it, "if it was good enough for the founders, it should be good enough for us."

The data may show that 14+14 is the best copyright term to promote the progress of the sciences, but Congress has simply refused to even seriously consider the data. While 14+14 years may seem short, it should be noted that commercial exploitation of a work took a lot longer 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 long time to advertise a work across the country. Today, commercial exploitation can often reach a global audience in a matter of days or hours, rendering untenable the argument that we need copyright durations exponentially longer than those of the Founding Era.

REGULATORY AND CONGRESSIONAL CAPTURE

While the copyright lobby has been remarkably successful in ensuring that their works never enter the public domain, effectively manipulating the system since at least the 1970s, in the realm of patent terms, there are interest groups on both sides of the issue. For every company that benefits from patent protection, there are other companies waiting for that protection to end, so they can use the technology.

Patents represent a deal between innovators and the general public: teach the world how to make your invention 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. 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 the Federalist Papers, 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. Additionally, for most of the groups involved, patents are just one of many issues they care about. As a result, they have to set lobbying priorities, rather than devoting all their firepower toward this one issue.

When it comes to copyright terms, the state of play is quite different. Deliberations on the last major copyright extension – 1997'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+70." At the time, the copyrights register reported that "perhaps because legislation did not appear on the horizon, only representatives who strongly supported increasing the term of protected appeared."110 But this did not change once legislation was introduced. In 1995, with legislation now on the table:

> No 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…no 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.[111]

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. Alas, such considerations appear never to have been discussed seriously. Instead, deliberations were dominated almost completely by large content creators, who accounted for roughly 6 percent of U.S. GDP and represented

110. Jonathan Weinberg, et. al. "Brief of Intellectual Property Law Professors as Amici Curiae Supporting Petitioners," U.S. Court of Appeals for the District of Columbia Circuit. http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/ip-lawprofs.pdf

111. Ibid.

either the largest or second-largest U.S. export.[112] They had significant lobbying influence, which has only grown more substantial.

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.[113] Disney's copyright on its flagship Mickey Mouse character had accounted for up to $8 billion in revenue in 1998.[114] Then-Disney Chairman Michael Eisner met personally with then-Senate Majority Leader Trent Lott, R-Miss.,[115] and Disney's political action committee contributed to Lott's campaign on the same day that he signed on as co-sponsor of the bill.[116] Within a month, Disney also gave $20,000 in soft money to the National Republican Senatorial Committee. Of the 13 initial sponsors of the House bill, 10 received contributions from Disney's PAC. On the Senate side, eight of the 12 sponsors received contributions.

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. Unlike in debates over patents, there was no major company on the other side. Some in the content lobby have pointed to technology companies as a special interest that confront the content lobby in their agenda. This is an example of common wisdom that is demonstrably false. While technology companies sometimes have copyright related interests, such as for safe harbor under the DMCA, there is no evidence of technology companies lobbying against extension of copyright terms. That was an issue that they have never devoted resources to confront, allowing for a one-sided special interest battle. 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 run-ins with the content industry, but the length of copyright terms has been irrelevant to those legal feuds. Most technology companies, even those that lobby on copyright issues, lobby to protect their bottom line. Given large but limited lobbying assets, they largely avoid policy battles in which they don't have a stake.

In a 1996 report for the Senate Judiciary Committee, Sen. Hank Brown, R-Colo. – the panel's only opponent to extending copyright terms – wrote that he "thought it was a moral outrage…There wasn't anyone speaking out for the public interest."[117] 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."[118] Sen. Brown would argue:

> To suggest that the monopoly use of copyrights for the creator's life plus 50 years after his death is not an adequate incentive to create is absurd…The real incentive here is for corporate owners that bought copyrights to lobby Congress for another 20 years of revenue—not for creators who will be long dead once this term extension takes hold.

There was then, and would continue to be to this day, no other major voice to argue this point in Congress. There was not, and doesn't appear to be today, anyone to guard copyright "with strictness against abuse," as James Madison instructed us more than 200 years ago.

Today, the MPAA is even more powerful in manipulating the policy process than in 1998, which can be seen with their attempt to pass the Stop Online Piracy Act and the Protect IP Act in 2012. 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…Don'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.[119]

Of the 26 current members of the House Judiciary Subcommittee on Intellectual Property, 18 received donations from the RIAA, MPAA and Disney for just the 2012 and upcoming 2014 cycles.

112. Marvin Ammori, "The Uneasy Case for Copyright Extension," *Harvard Journal of Law & Technology*, Vol. 16 No. 1, Fall 2002. http://jolt.law.harvard.edu/articles/pdf/v16/16HarvJLTech287.pdf

113. Janet Wasko, "The Magical-Market World of Disney," *Monthly Review,* Vol. 52 No. 11, April 2001. http://archive.monthlyreview.org/index.php/mr/article/view/MR-052-11-2001-04_5

114. Daren Fonda, "Copyright's Crusader," *Boston Globe Magazine*, Aug. 29, 1999. http://www.public.asu.edu/~dkarjala/commentary/Fonda8-29-99.html

115. Jesse Walker, "Copy Catfight," *Reason*, March 2000. http://reason.com/archives/2000/03/01/copy-catfight

116. Associated Press, "Disney Lobbying for Copyright Extension No Mickey Mouse Effort," *Chicago Tribune*, Oct. 17, 1998. http://www.public.asu.edu/~dkarjala/commentary/ChiTrib10-17-98.html

117. Timothy B. Lee, "15 years ago, Congress kept Mickey Mouse out of the public domain. Will they do it again," *Washington Post,* Oct. 25, 2013. http://www.washingtonpost.com/blogs/the-switch/wp/2013/10/25/15-years-ago-congress-kept-mickey-mouse-out-of-the-public-domain-will-they-do-it-again/

118. James Langton, "The Battle For Mickey," *Sunday Telegraph*, Feb. 15, 1998.

119. FoxNews.com, "Exclusive: Chris Dodd Warns of Hollywood Backlash Against Obama Over Anti-piracy Bill," Fox News, Jan. 19, 2012. www.foxnews.com/politics/2012/01/19/exclusive-hollywood-lobbyist-threatens-to-cut-off-obama-2012-money-over-anti

TRANS-PACIFIC PARTNERSHIP AND 'LIFE+100'

In the past year, 600 representatives, largely representing special interests and industry, have been involved in closed-door negotiations over the proposed Trans-Pacific Partnership Treaty. While we know the content industry is well represented in this process, there are various accounts of representatives from other interests being deliberately excluded, such as high-tech attorney Andrew Bridges not being allowed to represent the interests of various technology companies. No representatives have been allowed from public interest-oriented organizations like the Electronic Frontier Foundation or Public Knowledge.

If ratified, the TPP treaty – which involves 14 countries – would affect approximately 40 percent of U.S. exports and set the bar for another proposed treaty being negotiated with European countries, the Transatlantic Trade and Investment Partnership.

Among the provisions of this treaty are setting a bar for copyright durations. From a leaked draft, it has been revealed that the treaty includes language that would permanently lock in "life+70" copyright terms. Mexico was proposing a longer copyright term of "life +100," which, as of August 2013, the United States had neither accepted nor rejected.[120]

If the United States signs the TPP Treaty with a provision of minimum "life+70" copyright duration provision, it will make it nearly impossible for Congress to ever consider implementing reforms that are more consistent with our founding tradition. 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, the head of the U.S. Copyright Office mentioned the desirability of considering shorter copyright terms and called for the "Next Great Copyright Act."[121] 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. The Commerce Department released a green paper advising on potential reforms to deal with orphan works, remixing and other issues. If the White House signs a treaty that makes such reforms impossible, that would have significant deleterious effects on the reform effort. 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.

The TPP, as leaked, is a clear illustration of policy laundering. Special interests can't defend life+70 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; this has been their modus operandi for decades. 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.

Instead of Congress signing a new treaty to further lock in U.S. copyright law, it should be reconsidering 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 got Congress to pass copyright extension to life+70, thereby keeping their works under copyright for another 20 years. In 2018, with the prospect of billions of dollars of copyrighted works falling into the public domain, it is extremely likely that these 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 a duration of life+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.

CONCLUSION

Conservatives who care about the original public meaning of the Constitution must not abandon our constitutional obligation. Conservatives believe that the words of the Constitution mean something. If the words mean something, if they mean *anything*, then copyright must expire.

We must heed James Madison's warning: *to guard these instruments against abuse*. 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. 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."*[122] This is important to keep in mind, as special interests push

120. Cyrus Farivar, "Secret treaty leaks, Mexico wants copyright extended even more than US does," *Ars Technica,* Nov. 13, 2013. http://arstechnica.com/tech-policy/2013/11/secret-treaty-leaks-mexico-wants-copyright-extended-even-more-than-us-does/

121. Statement of Maria A. Pallante, "The Register's Call for Updates to U.S. Copyright Law," U.S. House Judiciary Committee, Subcommittee on Courts, Intellectual Property and the Internet, March 20, 2013. http://www.copyright.gov/regstat/2013/regstat03202013.html

122. George A. Akerlof, et al., "Brief of Economists in Support of Petitioners," *Eldred v. Ashcroft*, May 2002. http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf

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? As Peter Jaszi of American University's Washington College of Law has argued, the de facto status really would be perpetual copyright, just on the installment plan.[123]

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

ABOUT THE AUTHOR

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He was previously a professional staff member for the House Republican Study Committee, where he authored the widely read House Republican Study Committee report "Three Myths about Copyright Law."

DISCLOSURES:

Mr. Khanna has never received funding from any organization or company that lobbies for any form of copyright reform and has never been a registered lobbyist. In 2013 he was briefly a paid employee with Microsoft's legal department working on privacy policy issues. Microsoft lobbies in favor of strict copyright policy and in favor of the Digital Millennium Copyright Act (DMCA) and has never supported shorter copyright terms. Mr. Khanna also retains no investments in any companies or organizations that would benefit from copyright reform. Mr. Khanna wrote this policy brief and then submitted it to R Street Institute for publication and was paid for publication with no additional form of compensation from any company or organization.

ADDENDUM ON THE USE OF TERM "MONOPOLIES," NATURAL RIGHTS THEORY AND CONSERVATIVE TRADITION ON COPYRIGHT.

Formatting restrictions of this report precluded some legal footnotes that further justified several of its arguments. Many of the arguments in this piece are footnoted in a longer work that I produced for Cardozo Law Review and can be found online for free. Specifically, in this addendum I provide more justification for the use of the term "monopolies" when referring to copyright which, despite being the accurate legal and economic term, is controversial with some lobbyists and bloggers. They often argue from a misinformed conception of "natural rights" that copyright should be counted among those natural rights. This is a useful strategic move by lobbyists, but it is completely disconnected from historical tradition and is not backed by serious legal scholarship. Lastly there is overwhelming evidence that the conservative movement has long supported these types of reforms, I provide some evidence below.

A word on monopolies:
"Monopoly" is the accurate economic term for the instrument of copyright.

See George A. Akerlof, Kenneth J. Arrow, Timothy F. Bresnahan, James M. Buchanan, Ronald H. Coase, Linda R. Cohen, Milton Friedman, Jerry R. Green, Robert W. Hahn, Thomas W. Hazlett, C. Scott Hemphill, Robert E. Litan, Roger G. Noll, Richard Schmalensee, Steven Shavell, Hal R. Varian, and Richard J. Zeckhauser. See Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners at 3, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041846 ("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 127 (Fortieth Anniversary ed. 2002), available at http://books.google.com/books?id=iCRk066ybDAC&lpg=PA127&ots=QnYfBqU-kI&dq=&pg=PA127#v=onepage&q&f=false ("A kind of governmentally created monopoly very different in principle from those so far considered is the grant of patents to inventors and copyrights to authors."); Hayek, supra note 34, 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. . . . [the extension of property like rights to copyright has] done a great to foster the growth of

123. Term credited to Professor Peter Jaszi.

monopoly and that here drastic reforms may be required."). 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, University of Cambridge 2 (2009), http://rufuspollock.org/papers/optimal_copyright_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, in 56 The American Economic Review 421, 421–32 (Robert M. Schuchman ed., 1966), available at http://www.jstor.org/stable/1821305.

"Monopoly" is the accurate legal term for the instrument of copyright according to leading legal treatises.

See "Nimmer on Copyright", 10-volume work that is the most cited work in the field an considered to be the leading treatise on copyright law referring to copyright as a "limited monopoly." See also William Patry's "Patry on Copyright", another more recent treatise on copyright law, referring to copyright as a "monopoly."

"Monopoly" is the accurate legal term as derived from the vernacular of court decisions.

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, e.g., Eldred v. Ashcroft, 537 U.S. 186, 260 (2003) (Breyer, J., dissenting) (mentioning "the antimonopoly 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) ("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?").

The Supreme Court has long recognized that copyrights are government granted monopolies. See, e.g., 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"); Harper & Row v. Nation Enterprises, 471 U.S. 539, 546 (1985) ("The monopoly created by copyright thus rewards the individual author in order to benefit the public"); Sony Corp. v. Universal City Studios, 464 U.S. 417, 442 (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"); Twentieth Century v. Aiken, 422 U.S. 151, 156-159 (1975)("The limited scope of the copyright holder's statutory monopoly ... reflects a balance of competing claims upon the public interest"); Fox Film Corp. v. Doyal, 286 U.S. 123, 127-28 (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").

A word on natural rights:

The theory that copyright is a natural right is not taken seriously in the legal literature, as noted in two leading copyright treatises by Patry and Nimmer, because there is so much evidence that copyright was not ever treated as a natural right, or that if it was a natural right, it was such a circumscribed natural right that arguments for it being "property" are poorly placed and not on point.

See leading treatise on copyright, *Nimmer on Copyright* "copyright law in the United States has developed along two parallel tracks: federal (statutory) and state (common law). . . With the advent of the current Act on January 1, 1978, these parallel tracks converged."

See 1-1 Nimmer on Copyright § 1.04 ("In. . .Wheaton v. Peters the plaintiff argued, inter alia, the existence of a common law copyright upon which relief might be obtained quite apart from the terms of the federal copyright statute. In advancing this position, plaintiff pointed to the words "by securing" in the copyright clause. He argued that because the word secure signifies to protect, insure, save, and ascertain, it follows that the use of the term in the Constitution indicated in intention not to originate a right but to protect one already in existence. Hence, he concluded that the common law of copyright was in existence at the time of the adoption of the Constitution, and that the federal copyright legislation merely provided additional remedies for its implementation. The Supreme Court rejected this position holding that the term referred to the securing of a future right, not an existing right. The Court pointed out that the words "by securing," as used in the Constitution, referred to the rights of inventors as well as authors and as "it has never been presented, by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented" it must follow that the term "securing" referred to a future statutory right.")

See 1-1 Nimmer on Copyright § 1.03 ("The primary purpose of copyright is not to reward the author, but is rather to secure "the general benefits derived by the public from the labors of authors." The Supreme Court, in Mazer v. Stein, stated the purpose as follows: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'

Thus, the authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors, and that the copyright monopoly is a necessary condition to the full realization of such creative activities. Implicit in this rationale is the assumption that in the absence of such public benefit, the grant of a copyright monopoly to individuals would be unjustified. This appears to be consonant with the pervading public policy against according private economic monopolies in the absence of overriding countervailing considerations.")
William F. Patry, *Patry on Copyright* § 1:1 (2013). ("Copyright in the United States is not a property right, much less a natural right. Instead, it is a statutory tort, created by positive law for utilitarian purposes: to promote the progress of science. Once copyright is correctly viewed as positive law, proper discourse can take place . . . Abandoning the use of 'property talk' should assist in developing an acceptable balance of incentives and unconsented to and uncompensated uses, without creators being tagged as monopolists and without "users" being tagged as people seeking to reap what they have not sown."

See Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 660-661(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 . . .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.)
See Derek Khanna, *Reflection on the House Republican Study Committee Copyright Report*, Cardozo Arts & Entertainment Law Journal, Volume 32, Issue 1 (2013). Some is included below and others arguments are added for below.

1. If copyright is a natural right through traditional property rights, then why did the founders' copyright, state laws, Constitution, the 1790 Copyright Act and the British under the Statute of Anne ensure that it expires? Natural rights last forever, if you own the fruit of your labor under natural law, you would own that forever—not 14/28 years as the founders' copyright implemented.

2. If natural right arguments explain the extension of copyrights length and scope versus that of the Founding era, then under natural rights arguments why wouldn't the same principles be applicable to patents? But in the case of patents, term length has only increased from 14 to 17/20 years, whereas copyright terms have increased exponentially.

3. Natural rights arguments generally include a property right to full control of all derivative works. But, why then did the Founders' copyright, as statutorily enacted in 1790 at the federal level, limit only the "printing, reprinting, publishing and vending" of the protected works and not include any derivative control? The 1790 provision was interpreted as literal reproduction of the whole work, as even abridgement and translations were not deemed infringing for years. Notably, similar limitations existed across the state copyright laws of the eighteenth century and England with the Statute of Anne.

4. If copyright is a natural right, then what about the myriad of exceptions to copyright protection including the fair use doctrine and first sale? If it's a natural right, then why could someone use any of your "property?"

5. If copyright and patents are a natural right, are there other natural rights that the founders referred to as "monopolies?" Why did the founders choose to use a different vernacular choice to refer to natural rights, a vernacular choice that denotes that the instrument itself is optional and statutorily created versus a natural right?

6. Natural rights arguments generally include that this property right attaches to anything created. But then why did the founders' copyright, as statutorily enacted in 1790, only apply to maps, charts, and books? Why not theatrical performances or artwork? Similar limitations existed across state copyright laws of the eighteenth century and England with the Statute of Anne.

7. Natural rights arguments generally include that protection of the intellectual property is automatic upon creation, as in it does not require government granting because it exists even without the government. Then why did the founders' copyright, as statutorily enacted in 1790, and in eight state's copyright laws of the eighteenth century (and the British with the Statute of Anne), require registration with the government, and until 1988 required notice, for copyright protection? As further evidence of this point, a year after the 1790 act, France implemented their copyright system and chose to have no "formalities" of any

kind—which means that this concept was one that they could have considered at the time.

8. If copyright is a natural right, then why is it optional for Congress to create them? It is listed under Congressional powers, and like the power to constitute tribunals inferior to the Supreme Court, Congress could choose not to have copyrights and patents.

9. If natural rights arguments are similarly applicable to patents, then why is it acceptable for patents to adopt a first to file system rather than a first to invent system for protection (as they did in 2012)?

10. Wouldn't the scope of a natural right be self-defining, rather than specifically defined through statute? As the Supreme Court has explained, "The Copyright Act does not give a copyright holder control over all uses of his copyrighted work. . . . if a person, without authorization from the copyright holder, puts a copyrighted work to use within the scope of one of these 'exclusive rights,' he infringes the copyright. If he puts the work to a use not enumerated. . . . he does not infringe." But if it is a natural right, then even if it were not enumerated in the Act it would precede the Constitution and still apply under Ninth Amendment."

11. If copyright exists as a natural right then wouldn't it apply universally? The Copyright Act of 1790 explicitly denied copyright protection to any creative work "written, printed or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States."

12. Do natural rights supporters also oppose the "compulsory mechanical license," and would a natural rights argument make this license and similar statutory license schemes unconstitutional under the Ninth Amendment?

13. If copyright is a traditional property right, then why is the creation of copyright and patents the only power given to Congress with a specific delineated purpose to "promote" the "progress" of the "sciences" and the "useful arts"? No other power given to Congress expressly states its purpose.

A word on conservative movement and copyright:
In addition to the brief by economists to the Supreme Court in the Eldred case, and Frederich Hayek's statements on copyright as included above, a number of other prominent conservative voices have been in favor of potential copyright reforms.

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.");

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?"); Phyllis Schlafly, Copyright Extremists Should Not Control Information Flow, *Eagle Forum* (Jan. 1, 2003), 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."); 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 of Amici Curiae Eagle Forum Education and Legal Defense Fund and the Association of American Physicians and Surgeons, Inc. in Support of Petitioners, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01618), 2002 WL 1041834 at *27 [hereinafter Amici Curiae Eagle Forum] ("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."); Friedrich Hayek, Individualism and Economic Order 113–14 (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. . . . 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."); Milton Friedman, Capitalism and Freedom 128 (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.");

Richard Posner, Do Patent and Copyright Law Restrict Competition and Creativity Excessively?, Becker-Posner Blog (Sept. 30, 2012), www.becker-posner-blog.com/2012/09/do-patent-and-copyright-law-restrict-competition-and-creativity-excessively-posner.html ("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.");

Robert Merges & Glenn Reynolds, The Proper Scope of the Copyright and Patent Power, 35 Harv. J. on Legis. 45 (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.").