WAKE FOREST JOURNAL OF BUSINESS AND INTELLECTUAL PROPERTY LAW

VOLUME 18 WINTER 2018 NUMBER 2

FLAWS IN THE EVOLVING UNDERSTANDING OF THE CONSTITUTION'S INTELLECTUAL PROPERTY CLAUSE

C. Todd Mosley[†]

 Assistant Public Defender, Hancock County, Ohio. I want to sincerely thank my beautiful wife, Susanna Fleites, for her love, support, and most of all her patience. I am eternally grateful to Professor Deidré Keller for igniting my passion for intellectual property law. Lastly, I want to thank the entire staff at *Wake Forest Journal of Business and Intellectual Property Law* for their professional candor, expediency, and incredible insight. Any errors found herein are mine and mine alone.

I. INTRODUCTION

Article I, Section 8, Clause 8 of the United States Constitution confers onto Congress the authority "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.[1]

By design, and with the understanding of the immense power a monopoly can have, the framers of the Constitution found it necessary to grant such monopolies to better society.[2] This compromise would allow all those who created something useful, creative, or furthered science to reap the fruits of their labor.[3] However, this incentive was not intended to be a license that guarantees riches to the inventor, author, or assignees, but rather a reward for their societal contribution.[4] This incentive was a *quid pro quo* between the authors and the public.[5]

The *quid pro quo* found in the Intellectual Property Clause of the Constitution had a simpler understanding when it was drafted than it does today.[6] Originally, it was understood that we as a society would

[1] U.S. CONST. art. I, § 8, cl. 8.

[2] *See* Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 1009 (2013) (exploring the framers' understanding and common hatred of monopolies).

[3] *See* U.S. CONST. art. I, § 8, cl. 8.

[4] *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985); Dennis Harney, *Mickey Mousing the Copyright Clause of the U.S. Constitution: Eldred v. Reno,* 27 U. DAYTON L. REV. 291, 308 (2002); Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909, 924–25 (2002).

[5] *See* Harney, *supra* note 4, at 299.

[6] The predominant idea that intellectual property is a natural right is evidenced in our congressional enactments and even in our court cases. *See* Robert Epstein, *The Constitutional Foundations of Intellectual Property By Randolph J. May & Seth L. Cooper*, 17 FEDERALIST SOC'Y REV. 54, 54 (2016) (reviewing RANDOLPH J. MAY & SETH L. COOPER, THE CONSTITUTIONAL FOUNDATIONS OF INTELLECTUAL PROPERTY (2015)) (explaining that the Lockean Natural Law Theory heavily influenced the Founding Fathers in crafting the Constitution); *see also* Gene Quinn, *Patents, Copyrights and the Constitution, Perfect Together,* IP WATCHDOG (May 4, 2011), http://www.ipwatchdog.com/2011/05/04/patents-copyrights-and-the-constitution-perfect-together/id=16769/ (demonstrating that Congress has repeatedly passed legislation to grant patents and copyrights). The Founding Fathers hesitantly recognized monopolies. *See* James Madison, *Monopolies Perpetuities Corporations Ecclesiastical Endowments*, *in* WORDS OF THE FOUNDING FATHERS 143, 143 (Steve Coffman ed., 2012) (reiterating Madison's view of the forbidden sense of monopolies while acknowledging that in certain case they can be useful). While they may be useful, monopolies must be "guarded with strictness against abuses." *Id.* The Founders found it necessary to state that we are not to have a perpetual right in copyright and other intellectual property regimes because the right of a learned man trumps the statutory right to a monopoly. *Id.*

continued . . .

grant you, inventor or author, a statutory monopoly right in your work, and in return, after the expiration of said monopoly, your work would move into the public domain[7] for all to use freely.[8] Today the prominent understanding – or misunderstanding – of intellectual property tends to be more towards allocating intellectual property the same rights found in natural property.[9] Many, including some members of Congress, believe that since it is the author's creation, the author should have a perpetual property right in the work.[10] This perpetual right theory is detrimental to the existence of the public domain.

The transition from monopoly to public domain is fundamentally necessary for the progress of science and the useful arts, as most, if not all, intellectual property has an essential connection to earlier creations and discoveries.[11] John of Salisbury wrote: "We are like dwarfs sitting on the shoulders of giants. We see more, and things that are more distant than they did, not because our sight is superior or because we are taller than they, but because they raise us up, and by their great stature add to ours."[12] John was a distinguished philosopher, educationalist,

---

[7] *Public Domain*, NOLO'S PLAIN-ENGLISH LAW DICTIONARY (1st ed. 2009). The public domain is a collection of works that do not have, or no longer have, copyright protection. *See id.* It is free for anyone to use any of the works in the public domain. *See id.* The public domain consists of:

> Ideas and facts; Works with expired copyrights; Works governed by early copyright statutes that failed to meet the requirements for copyright protection, i.e., notice, registration, and renewal requirements; U.S. government works; Scientific and other research methodologies, statistical techniques and educational processes; Laws, regulations, judicial opinions, government documents and legislative reports; Words, names, numbers, symbols, signs, rules of grammar and diction, and punctuation.

Public Domain, U.C. COPYRIGHT, http://copyright.universityofcalifornia.edu/use/public-domain.html (last visited Nov. 3, 2017).

[8] *See* James E. Rogan, Dir., U.S. Patent & Trademark Office, Prepared Remarks at the Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy (Feb. 6, 2002), https://www.uspto.gov/about-us/news-updates/competition-and-intellectual-property-law-and-policy-knowledge-based-economy ("While patents can encourage risk-taking and investment in new ideas, patent law also limits the advantage that a patent confers. An inventor does not have exclusive rights to his invention forever. Once the term of the patent expires, the invention is in the public domain and may be used or manufactured by anyone.").

[9] *See generally* Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest,* 44 SANTA CLARA L. REV. 365 (2004) (elaborating on the issues Congress faces when enacting copyright law).

[10] *See id.* at 447.

[11] *See* Harney, *supra* note 4, at 299.

[12] *See* Linda Chatman Thomsen, *Standing on the Shoulders of a Giant*, 1 BROOK. J. CORP. FIN. & COM. L. 1, 2 (2006).

continued . . .

and historian from the twelfth century.[13] His quote was referring to the idea of education, which is still relevant today, as this idea is the driving force behind the public domain.[14]

The limited monopoly of intellectual property rights was created to spur creativity,[15] and did so quite well, as early inventers and authors were very successful in their creations.[16] But what changed? This Article will explore the question of why Congress, over the past forty years, has found it necessary to extend the period in which the author, or even an assignee, may legally keep others from sitting on the shoulders of giants. Furthermore, this Article will explore the issue of whether authors were unhappy with the length of the original monopoly term granted by copyright law and were therefore unwilling to create new works of expression.

This Article will explore the fundamental causes behind unconstitutional overextensions of intellectual property rights. In doing so, it will reveal the foundation of copyright law, highlight the Founding Fathers' intent behind the Copyright Clause of the Constitution, and follow legislative history as it whittled away at the Founding Fathers' original intent. Throughout the relevant legislative history, this Article will identify prominent issues, including the natural right conflation that, in recent years, has overridden the constitutional purpose of a statutory right in intellectual property. Moreover, this Article will also address the role businesses played in the expansion of intellectual property rights. It will also use a recent Supreme Court case, *Kirtsaeng v. John Wiley & Sons,*[17] as a point-of-reference to identify shifts in the Supreme Court's views of intellectual property law. This Article will further explore whether it is too late to save the original meaning set forth in the Constitution without uprooting and completely overhauling intellectual property law. Finally, this Article will provide basic solutions that could guide our next copyright act.

---

[13] *See* Bradley Aron Cooper, *Defending Liberty and Defeating Tyrants: The Reemergence of Federal Theology in the Rhetoric of the Bush Doctrine*, 85 U. DET. MERCY L. REV. 521, 526 (2008).

[14] *See* Chatman, *supra* note 12, at 2; *see, e.g.*, Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37, 77 (D. Mass. 1990).

[15] *See* Dallon, *supra* note 9, at 436.

[16] *Nineteenth-Century American Literature*, COLUM. U., http://english.columbia.edu/nineteenth-century-american-literature (last visited Oct. 24, 2017) (listing some of the greatest authors in American history).

[17] *See generally* Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519 (2013) (involving alleged copyright infringement against a domestic reseller of textbooks that were first manufactured and sold abroad).

continued . . .

II. RELEVANT ENGLISH COPYRIGHT HISTORY

Even though Bi Sheng, a Chinese national, is credited with inventing the world's first movable type printing press,[18] it was William Caxton[19] who introduced printing to Europe.[20] With the introduction of the printing press, the need for intellectual property rights was born.[21] In 1469, Johann of Speyer was granted the first patent for the printing press.[22] He had the exclusive right to print all books in Venice for five years.[23] While printers and booksellers were enjoying the profits from the printing industry, authors were left in the shadows.[24]

Authors were not the only ones who were impacted by this technological marvel.[25] The English Crown feared the consequences of the printing industry flourishing without regulation.[26] That fear was based on the possibility of wide dissemination of anti-religious and anti-Crown literature that could put the Crown at risk.[27] The solution came in 1534 when the Crown declared it illegal to print without a license from the Crown.[28] Each publisher had to pass inspection by a censorship board.[29] Then in 1557, the Crown found a publisher and bookseller it could trust, and England granted the first copyright protection to the Stationers' Company.[30] As a result of this copyright that vested only in The Stationers' Company, authors received no protection against reproduction of their work.[31] To further add insult to injury, the Stationers' Company received a copyright that was perpetual in duration.[32] The only protection an author maintained was a property right — which was based in common law — in the unpublished original

[18] Li Yufeng & Catherine W. Ng, *Understanding the Great Qing Copyright Law of 1910*, 56 J. COPYRIGHT SOC'Y U.S. 767, 767 (2009).

[19] Craig Joyce, *Prologue: The Statute of Anne: Yesterday and Today*, 47 HOUS. L. REV. 779, 781 (2010).

[20] *See id.*

[21] *See* Russell L. Weaver*, The Internet, Free Speech, and Criminal Law: Is It Time for A New International Treaty on the Internet?,* 44 TEX. TECH L. REV. 197, 209 (2011).

[22] *See* J.A.L. STERLING L.L.B., WORLD COPYRIGHT LAW § 80.02 (Sweet & Maxwell 2d ed. 2003).

[23] *See id.*

[24] *See* ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 431 (Aspen Publishers 6th ed. 2012).

[25] *See* Joyce, *supra* note 19, at 781.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 782.

[31] *Id.*

[32] MERGES ET. AL., *supra* note 24, at 431.

continued . . .

manuscripts.[33] This common law did not recognize either direct copying from another's work or stealing their ideas,[34] and current copyright law still does not protect the latter.[35]

It took over 150 years from the decree that allowed the Stationers' Company a complete monopoly over the printing industry for the first copyright to be vested in the author.[36] With the self-interested help of the Stationers' Company,[37] in 1710, the Statute of Anne created a statutory right that vested an exclusive monopoly in the author.[38] The publishing companies were not left out in the cold, however, as they were able to maintain control over all existing publications until 1731.[39] Therefore, an author of any new work was personally granted a monopoly after 1731.[40]

The duration of the copyright term was short compared to today's standards.[41] The author was granted fourteen years, and could receive another fourteen years by renewal.[42] The policy of the Statute of Anne was based upon the common good.[43] The first sentence of the statute declares that this is: "An act for the encouragement of learning . . . ."[44] Furthermore, the language of the statute expressly condemned publishers' oppressive and detrimental treatment of authors:

> Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing . . . without the consent of the authors or proprietors of such books and writings, to their very

[33] *See* U.S. CONST. art. I, § 8, cl. 8; *contra* Dallon, *supra* note 9, at 415 (arguing the existence of a common law copyright before the Statute of Anne).

[34] *See* Dallon, *supra* note 9.

[35] *See generally* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (explaining the idea expression dichotomy).

[36] *See* Joyce, *supra* note 19, at 781–82.

[37] *See id.* at 782 ("After a controversial and checkered career, during which the stationers' rights were used as an instrument of both monopoly and press control, official licensing to publish expired in 1694, leaving the Company unsheltered by regulation and vulnerable to competition from 'upstart' publishers."). The Company feared competition from outside publishers that could undercut its monopoly. *Id.* Therefore, the Company lobbied for the Statute of Anne to allow authors to have vested rights so that it could obtain the copyright directly from the author. *Id.*

[38] *Id.* at 783.

[39] Statute of Anne 1710, 8 Ann. c. 19 (Eng.).

[40] *See* Joyce, *supra* note 19, at 783.

[41] *See, e.g.*, 17 U.S.C. § 302 (2012) ("Copyright terms . . . subsists from its creation and . . . endures for a term consisting of the life of the author and 70 years after the author's death.").

[42] 8 Ann. c. 19.

[43] *Id.*

[44] *Id.*

continued . . .

> great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books.[45]

The Statute of Anne represents empirical evidence of the Crown's understanding of businesses' natural instincts to dominate their market.[46] This business-based self-perpetuation is further evidenced by the desperate plead by the Stationers' Company to the Crown for copyright reform,[47] hence the Statute of Anne.[48] This historical focal point is important for our own understanding of where we as a nation are heading, towards a country that has its knowledge controlled by businesses that may seek monetary gain rather than the promotion of intelligence and creativity.

However, the Crown understood that copyright should not be completely vested in the publishing company or printing press, as this was a "detriment" to authors and to "learned men."[49] Even if an author assigned all of his rights to a publishing company, the maximum term the publishing company could hold the copyright was fourteen years, unless the author assigned their renewal interest.[50] After the fourteen years, the copyright would revert back to the author.[51] Some argue that this right was still assignable, thus, defeating the purpose.[52] Either way,

---

[45] *Id.*

[46] *See id.*

[47] *See* Dallon, *supra* note 9, at 402. The Stationers' Company saw its chance to keep its control by purchasing copies from authors. *Id.* at 403. But in order for this to become a reality, the Crown needed to vest rights in the authors. *Id.*

[48] *See* BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 8 (1967). Kaplan argues that the Stationers' Company intentionally put forth authors interest along with their own to ensure that the parliament would pass the Statute of Anne. *Id* at 8–9. This, Kaplan continued, would appear to help authors – and in reality, would – but at the same time would preserve the Stationers' Company business model, as they received a copyright in the books they had already printed and had rights to print. *See id.* at 7–9. *See also* Oren Bracha, *The Statute of Anne: An American Mythology,* 47 HOUS. L. REV. 877, 884 (2010). Bracha explains the rise of the Statute of Anne's beneficiaries as those the Stationers' Company wished them to be. *Id.* ("Those forces and influences included the attempt of the London publishers' guild—the Stationers' Company—to preserve as much as possible of its traditional privileges and powers; fears over the monopoly and economic power of the Company; a new interest in protecting the wellbeing of authors; and the public policy of the encouragement of learning. The two latter purposes were introduced into the public debate by the Stationers, mainly as a pretext for promoting their own interests.")

[49] *See* 8 Ann. c. 19.

[50] *See id.*

[51] *Id.*

[52] *See* Benjamin Kaplan, *An Unhurried View of Copyright: Proposals and*

continued . . .

this gave the author an option, and if assigned, the business would have received a truly limited monopoly.[53]

Under the Statute of Anne, only the author could renew the additional term of fourteen years.[54] If the author died, the renewal process died with them.[55] Even if the author had assigned the final fourteen years to another and the author died before the renewal, the assignment was destroyed.[56] This was an intentional fail-safe that gave authors leverage that could be alienated separately from the original contract.[57] Acting as a device that leveled the playing fields between businesses and authors, this reversionary clause gave authors the ability to renegotiate after the first fourteen years, or the authors could keep the copyright for themselves.[58] Understanding these aspects of the Statute of Anne is important, as the United States Copyright Act was drafted in the image of the Statute of Anne.[59] Additionally, it is necessary to understand the origins of the Statute of Anne because of the major role it played in the drafting of the Copyright Clause in the United States Constitution.[60]

III. COPYRIGHT AND THE CONSTITUTION

A. The Need for Copyright Protection

Beginning in the late eighteenth century, the "Father of Copyright," Noah Webster, started the fight in the United States to give authors protection for their writings.[61] In 1782, Noah petitioned the Connecticut General Assembly to give authors rights in their intellectual property.[62] In 1783, Webster's efforts bore fruit as

Prospects, 66 COLUM. L. REV. 831, 847 (1966).

[53] *See* 8 Ann. c. 19.

[54] *See id.*

[55] *See id.* ("That after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years.").

[56] *See id.*; *see also* Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 BERKELEY TECH. L.J. 1427, 1443 (2010).

[57] *See* Bracha, *supra* note 56, at 1438.

[58] *Id.*

[59] Bracha, *supra* note 48, at 877–78.

[60] *See id.* at 886–88.

[61] Randolph J. May & Seth L. Cooper, *Literary Property: Copyright's Constitutional History and its Meaning for Today*, FREE ST. F. 1 (July 25, 2013), http://www.freestatefoundation.org/images/Literary_Property_Copyright_s_Constitutional_History_and_its_Meaning_for_Today_072413.pdf.

[62] *Id.*

continued . . .

Connecticut recognized an author's exclusive right to receive earnings from their work.[63] The terms of the Connecticut Copyright Act retained the familiar fourteen-year term found in the Statute of Anne.[64] Connecticut was the first state to recognize the need for author protection, and it was not the last state to enact laws that recognized an author's exclusive right to his writings.[65] According to Randolph J. May and Seth L. Cooper, Noah Webster was the main proponent who lobbied for legislation that passed in New York, Massachusetts, New Jersey, South Carolina, Virginia, Maryland, Delaware and Pennsylvania.[66]

Webster's advocacy was intense, as he was an author seeking protection of his own work.[67] But he did not want to stop at time-limited protection; he wanted a perpetual copyright for authors.[68] In his "Lockean" view, Webster thought that since his labor created the work, he should be entitled to more than just limited protection.[69] In an 1824 letter written by Noah Webster to his cousin, Massachusetts Senator Daniel Webster,[70] Noah again attempted to persuade Congress that authors deserved a perpetual right in their copyright.[71] Webster's letter stated:

> I sincerely desire that, while you are a member of the House of Representatives in Congress, your talents may be exerted in placing this species of property on the same footing as all property as to exclusive right and permanence of possession.
>
> Among all modes of acquiring property – or exclusive ownership, the act or operation of creating or making seems to have the first claim. If anything can justly give

[63] *Id.*

[64] *Id.*; *see also* Statute of Anne 1710, 8 Ann. c. 19 (Eng.).

[65] May & Cooper, *supra* note 61 (noting that Pennsylvania became the last state to pass a copyright law just prior to the 1787 Constitutional Convention in Philadelphia).

[66] *Id.*

[67] *Id.* (noting that Webster had authored his own spelling instruction book).

[68] *See id.*

[69] *See id.*; *see also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 137 (Thomas I. Cook ed. 1947) ("Nor was appropriation . . . of land by improving it any prejudice to any other man, since there was still enough and as good left . . . [F]or he that leaves as much as another can make use of does as good as take nothing . . . .").

[70] *See* Daniel Webster, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=w000238 (last visited Nov. 4, 2017).

[71] *See* ERIC WERTHEIMER, UNDERWRITING: THE POETICS OF INSURANCE IN AMERICA 95 (2006).

continued . . .

> a man an exclusive right to the occupancy and enjoyment of a thing, it must be the fact that he made it. The right of a farmer and mechanic to the exclusive enjoyment and right of disposal of what they make or produce is never questioned.
>
> What, then, can make a difference between the produce of muscular strength and the produce of the intellect? If it should be said that as the purchaser of a bushel of wheat has obtained not only the exclusive right to the use of it for food – but the right to sow it and increase and profit by it, let it be replied, this is true; but if he sows the wheat, he must sow it on his own ground or soil. The case is different with respect to the copy of a book – which a purchaser has obtained, for the copyright is the author's soil, which the purchaser cannot legally occupy.[72]

Webster's advocacy, while passionate and unwavering, failed to elevate intellectual property to the same protection level as natural property.[73] This perpetual right was far too extreme for Congress at the time.[74] It is important to understand that there were many who vigorously campaigned for perpetual property rights during the drafting of both the first Copyright Act and the Constitution.[75] Notwithstanding this staunch advocacy, both Congress and the Framers decided that an unlimited monopoly was too detrimental to society.[76] Therefore, intellectual property should not be confused with personal property or real property. A perpetual copyright would be against the heart of intellectual property's constitutional purpose: the idea that authors have rights in their work, but in return, they must, after a limited time, relinquish their work to the public domain.[77] In granting a monopoly, progress in science and the useful arts could be greatly diminished, and possibly destroyed, if each author was allowed a perpetual right to his work.

---

[72] *Id.*

[73] *See* U.S. CONST. art. I, § 8, cl. 8.

[74] *See id.*

[75] Quinn, *supra* note 6.

[76] *See* Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (current version codified at 17 U.S.C. § 102); *see also* THE FEDERALIST NO. 43 (James Madison) ("The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors.").

[77] *See id.* There is a need for an inventor to have access to others' inventions. This would be difficult if a perpetual term were applied.

continued . . .

Noah Webster was not the only person who advocated for intellectual property protection. James Madison was also an extremely important figure in the intellectual property movement.[78] With his participation, the Continental Congress recognized the need for intellectual property protection and drafted a resolution that recommended that every state enact laws to protect authors' rights in the works they create.[79] Like Webster, Madison also believed that protection should be afforded to authors because their works were the fruit of their labor.[80] Madison also believed, however, as evidenced by the Federalist Papers, that an author should have an exclusive right, but that right should only be held for a limited time.[81] This was because the expiration of the limited monopoly and the entrance of the author's work into the public domain was necessary to further a creative and learned society.[82] Thus, the main argument in favor of intellectual property rights was not for the benefit of authors, but rather to ensure the public was educated, cultured, and well informed.[83] In Federalist 43, James Madison wrote:

> The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.[84]

It was this understanding, the promotion of a learned society, that created our Constitution's Intellectual Property Clause.[85] Unlike Webster, Madison feared the impact monopolies would have in the United States.[86] Allowing for a government-sponsored monopoly was

[78] May & Cooper, *supra* note 61, at 8.
[79] Dallon, *supra* note 9, at 417.
[80] *See* May & Cooper, *supra* note 61, at 3.
[81] *Id.*
[82] *See* Dallon, *supra* note 9, at 424.
[83] *See id.*
[84] THE FEDERALIST NO. 43 (James Madison).
[85] *See* Dallon, *supra* note 9, at 422 ("The Copyright Clause does enjoy some similarity with the Continental Congress's resolution and the Virginia copyright act, both of which Madison participated in drafting.").
[86] *See id.* at 424 (quoting James Madison: "With regard to Monopolies they are justly classed among the greatest nusances [*sic*] in Government.").

continued . . .

truly repugnant to the Founding Fathers' idea of a free county.[87] Nonetheless, for the public good, Madison and the other Founding Fathers understood the importance of perpetuating inventions and artistic creations in order to thrive as a modern society.[88] While these intentions remain intact today,[89] the balancing act between public good and granting monopoly intellectual property rights has changed significantly.

B. Significance of the "Limited Times" Provision

The Limited Times provision is one of the most significant provisions in the Intellectual Property Clause. This provision places limits on Congress.[90] When the Framers drafted other provisions of the Constitution, besides the Intellectual Property Clause, they used broad language to define how to achieve the desired objective.[91] As noted by Todd Canni, "the Copyright Clause became the only power in Article I of the Constitution that explicitly stated both its objectives, promoting the progress of the arts and sciences, and the means to accomplish those objectives, giving limited protection."[92] Therefore, deliberate caution was taken by the members of the First Congress to ensure that the Copyright Act of 1790 did not extend beyond the constitutional limits expressed in the Intellectual Property Clause of the Constitution.[93]

The First Congress interpreted the Limited Times provision to mean fourteen years.[94] This interpretation represents strong evidence of how far the Limited Times provision should extend. As a product of this interpretation, the first Copyright Act, drafted and passed by the First Congress, included a term of fourteen years with an extension of another fourteen years, but only if the author was still living.[95] It is notable that these term limits reflected the same term limits found in the Statute of Anne and that of many individual states before the adoption of the Constitution.[96] Notwithstanding this clear, and arguably most accurate,

[87] *Id.*
[88] *Id.*
[89] *Id.* at 366.
[90] U.S. CONST. art. I, § 8, cl. 8.
[91] *See* Todd John Canni*, Promoting Progress Through Perpetual Protection: The Struggle to Place Limits on Congress' Copyright Power,* 53 CATHOLIC U.L. REV. 161, 168–69 (2003) (explaining the importance of the limiting language used by the Framers in the Copyright Clause as opposed to the broader language used by the Framers in other Constitutional drafting).
[92] *Id.*
[93] *Id.*
[94] *Id.* at 169.
[95] *Id.*
[96] *See* JOHN ROMAIN ROOD, IMPORTANT ENGLISH STATUTES SUCH AS ARE RE-

continued . . .

congressional interpretation of the Limited Times provision, the public's right to receive their bargained for consideration began to erode in 1831 when Congress decided to extend copyright protection to match the extension found in England.[97]

IV. COPYRIGHT EXTENSION

In 1831, Congress passed the first copyright extension.[98] Congress extended the initial copyright term to twenty-eight years with an additional fourteen-year extension that was applicable to the author or, if deceased, his widow and children.[99] The congressional intent behind this extension was to align the United States with the new copyright extension in England.[100] Again, appealing to those who believed intellectual property should be treated as natural property, the House Judiciary Committee attempted to align intellectual property with real property.[101] But still, the idea of a perpetual copyright, as continuously advocated by Noah Webster, was once again rejected.[102]

In 1909, Congress again extended United States copyrights.[103] Legislators continued to promote knowledge and a learned society in the 1909 Copyright Act, echoing the fundamental idea found in the Constitution.[104] In full acknowledgement of the *Wheaton v. Peters*[105] Supreme Court opinion, which laid the judicial ground work for the rejection of perpetual common law rights in intellectual property,[106] the House and Senate reports both included passages that further rejected the notion of natural property rights in intellectual property.[107] The House Report stated:

> The enactment of copyright legislation by Congress

ENACTED IN FORM OR IN SUBSTANCE IN MOST OF THE STATES OF THE UNITED STATES 20 (1900); *see also* Dallon, *supra* note 9, at 418 (stating seven states had two fourteen-year terms).

[97] Dallon, *supra* note 9, at 366.

[98] *Id.*

[99] Act of Feb. 3, 1831, ch. 16, §§ 1–2, 4 Stat. 436–37.

[100] ROOD, *supra* note 96, at 20.

[101] H.R. REP. NO. 3, at 2 (1830).

[102] *See* WERTHEIMER, *supra* note 71, at 95.

[103] *See Highlight: Congress Passes the First Comprehensive Copyright Law of the 20th Century*, U.S. COPYRIGHT, https://www.copyright.gov/timeline/timeline_1900-1950.html (last visited Oct. 24, 2017).

[104] *See* H.R. REP. NO. 2222, at 7 (1909); *see also* S. REP. NO. 1108, at 7 (1909) (incorporating and quoting H.R. REP. NO. 2222).

[105] Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1893).

[106] *See id.* at 601.

[107] *See* H.R. REP. NO. 2222, at 7; *see also* S. REP. NO. 1108, at 7 (incorporating and quoting H.R. REP. NO. 2222).

continued . . .

> under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.[108]

With a clear and concise statement that intellectual property should not be considered natural property, the Copyright Act of 1909 extended the copyright term limit.[109] The Copyright Act of 1909 extended the copyright renewal term from fourteen years to twenty-eight years.[110] This made fifty-six years the new maximum term of copyright protection.[111] Another important provision of the Copyright Act of 1909 that further extended copyright protection was the ability of executors and next of kin to renew the author's copyright when the author's widow and children were absent.[112]

However, the biggest shift in copyright law came with the Copyright Act of 1976 when the twenty-eight-year term, with a possibility of renewal for an additional twenty-eight years, was retired for the term of the "life of the author [plus] fifty years."[113] This shift excluded the possibility that copyrights may lapse due to an author's failure to renew their copyright.[114] This shift from the 1909 Copyright Act therefore created an unconstitutional discord between the Limited Times provision of the Constitution and the Copyright Act. It also created the issue of orphaned works.[115] Without a renewal requirement, owners who are unknown, or who cannot be located, create problems for authors attempting to use orphaned works.[116] Furthermore, the 1976

---

[108] H.R. REP. NO. 2222, at 7.

[109] *Id.* at 14–15.

[110] Copyright Act of 1909, 35 Stat. 1075, 1080 (current version codified at 11 U.S.C. § 302 (2012)).

[111] *See id.*

[112] *See id.*

[113] Copyright Act of 1976, 4 U.S.C. § 302 (1994) (alteration in original) (current version at 11 U.S.C. § 302 (2012)).

[114] Copyright Act of 1909, 35 Stat. 1075 (current version codified at 11 U.S.C. § 302 (2012)) (requiring owners to renew their copyright after twenty-eight years). It is not required to register a writing for copyright protection, as the right springs to life once the author creates an expression that is in a tangible medium. *See* 11 U.S.C. § 302 (2012) (stating copyright protection begins at creation); 11 U.S.C. § 408 (2012) (stating registration is not a requirement for protection).

[115] U.S COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 1 (2006).

[116] *See* David B. Sherman, *Cost and Resource Allocation Under the Orphan Works Act of 2006: Would the Act Reduce Transaction Costs, Allocate Orphan Works Efficiently, and Serve the Goals of Copyright Law?,* 12 VA. J.L. & TECH. 4, 18 (2007).

continued . . .

Act also removed the requirement that an author register their copyright to receive protection.[117] Therefore, today, an author's copyright protection begins when they put their expressions into a tangible medium.[118] Without a registration and renewal requirement, issues surrounding orphaned works have become a significant problem.[119]

Congress attributed the Berne Convention to the 1976 shift.[120] The Berne Convention gave reciprocity to authors between countries, allowing United States authors to enjoy the rights that foreign nationals enjoy in their home country.[121] But in order to become a signatory, the United States needed to make changes to its copyright law.[122] After making the necessary changes, the United States became a signatory nation in 1988.[123]

Although Congress passed the biggest term extension in copyright history, it continued to recognize – at least in words – the importance of the public benefit element to the Copyright Clause.[124] Senator John McClellan, the Chairman of the Senate Judiciary Subcommittee on Patents, Trademarks, and Copyrights, stated:

> The Constitution makes clear that the purpose of protecting the rights of an author is to promote the public interest. But, as stated in the committee report on the Act of 1909 — The granting of such exclusive rights . . . confers a benefit upon the public that outweighs the evils of the temporary monopoly . . . . The Judiciary Committee has tried to resolve each issue by applying the standard of what best promotes the constitutional mandate to encourage and reward authorship . . . that

[117] 17 U.S.C § 408(a) (2012) ("At any time during the subsistence of the first term of copyright in any published or unpublished work in which the copyright was secured before January 1, 1978, and during the subsistence of any copyright secured on or after that date, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Such registration is not a condition of copyright protection.").

[118] *See* Christina M. Costanzo, Comment, *Have Orphan Works Found A Home in Class Action Settlements?,* 83 TEMP. L. REV. 569, 571 (2011).

[119] *Id.* at 572.

[120] *Id.* at 571.

[121] *See* 313 CORPORATE COUNSEL INTERNATIONAL ADVISER 2 (2011).

[122] Dallon, *supra* note 9, at 440.

[123] CORPORATE COUNSEL INTERNATIONAL ADVISER, *supra* note 121, at 2. These changes included, among other requirements, the extension of copyrights terms to life plus fifty years and the deletion of the requirement to register with a copyright office. *See* 17 U.S.C. § 302 (2012); 17 U.S.C. § 408 (2012).

[124] Dallon, *supra* note 9, at 437–38.

continued . . .

> [his] sole objective 'was to devise a modern copyright statute that would encourage creativity and protect the interests which the public has.[125]

But even with the knowledge that the constitutional purpose behind the Intellectual Property Clause was intended to protect authors only as a means to an end, Congress decided to hinder the public's ability to receive new works by freezing the public domain.[126] This directly obstructed the public benefit that represents the foundational reasoning for allowing a governmentally protected monopoly.

V. FROM PUBLIC BENEFIT TO ECONOMICS: CONGRESS CHANGED THE INTENT OF COPYRIGHT

Congress, in the course of extending copyright term limits, expressed an eerie understanding of intellectual property and tends to treat intellectual property as though it were natural property.[127] To add to this mischaracterization, globalization and international trade have created a problem of conformity that Congress has attempted to resolve by expanding copyright protection.[128] Even though business entities have been involved in intellectual property well before the Statutes of Anne in England,[129] businesses today have again become dominant players in the intellectual property world, similar to the pre-Statute of Anne era.[130] The idea that copyright protects the "starving artist" is still alive and well, and indeed it should be, but there is a misunderstanding between copyright protections — i.e. to protect the monopoly of the copyright holder — and protecting the creator, which completely undermines the intellectual property regime.[131]

Today, when an attack on copyright protection is mentioned, there

---

[125] *Id.* at 436 (alteration in original).

[126] *Id.*

[127] *See id.*

[128] *See* Michael Landau, *Fitting United States Copyright Law into the International Scheme: Foreign and Domestic Challenges to Recent Legislation*, 23 GA. ST. U.L. REV. 847, 857 (2007).

[129] *See* JOHN FEATHER, A HISTORY OF BRITISH PUBLISHING 29–30 (2d ed. 2006) (noting that the Stationers' Company began in 1403).

[130] *See* Emanuela Arezzo, *Intellectual Property Rights at the Crossroad between Monopolization and Abuse of Dominant Position: American and European Approaches Compared*, 24 J. MARSHALL COMPUTER & INFO. L. 455, 457 (2006); *see also* Dallon, *supra* note 9, at 402.

[131] *See* Shun-Ling Chen, *Exposing Professionalism in United States Copyright Law: The Disenfranchised Lay Public in a Semiotic Democracy*, 49 U.S.F.L. REV. 57, 107 (2015); Kate O'Neill, *Against Dicta: A Legal Method for Rescuing Fair Use from the Right of First Publication*, 89 CALIF. L. REV. 369, 395–396 n.94 (2001).

continued . . .

seems to be a conflation of whom the copyright protects.[132] What most people do not see is that businesses are the ones truly affected, as most authors have already assigned a publisher their rights to their creation.[133] These intellectual property holding businesses have deep pockets and influential agents lobbying on Capitol Hill.[134] With the expiration of each monopoly, these businesses lose great sums of money.[135] Since the enactment of the Copyright Act, Congress has extended the length of these monopolies four times.[136] Currently, with an average life expectancy of 78.8 years,[137] if an author creates a work at the age of twenty-five, the current monopoly is over 430% longer than the original Copyright Act of 1790.[138]

Over the last forty years, Congress has lost sight of why we allow these legal monopolies in the first place.[139] They were not created to allow Disney to use its political power to push for unconstitutional extensions of copyright protection for its soon-to-expire sketch of a funny-looking mouse.[140] But rather, it was meant to encourage those like Disney to create other characters with the incentive of a limited monopoly, and to allow those characters to enter the public domain to further spur creativity in others.[141]

With economics in mind, Congress enacted the Copyright Term Extension Act (CTEA) in 1998.[142] The new copyright limited

---

[132] *See* O'Neill, *supra* note 131, at 395. *See infra* note 194 (discussing Sonny Bono's suggestion for perpetual copyright to protect authors).

[133] *See, e.g.*, Harney, *supra* note 4, at 304; *Authors, Keep Your Copyrights. You Earned Them.*, THE AUTHORS GUILD (Aug. 13, 2015), https://www.authorsguild.org/industry-advocacy/authors-keep-your-copyrights-you-earned-them/.

[134] *See* Harney, *supra* note 4, at 303.

[135] *Id.* at 305–06.

[136] *See* Copyright Act of 1831, ch. 16, § 1, 4 Stat. 436 (extending copyright term from fourteen to twenty-eight years, with an optional fourteen-year extension); Copyright Act of 1909, ch. 320, § 23, 35 Stat. 1075 (extending renewal period from fourteen years to twenty-eight years); 17 U.S.C. § 302(a) (1976) (extending the copyright term to "the life of the author and fifty years after the author's death"); 17 U.S.C. § 304(a) (2012) (extending the copyright term to "the life of the author and 70 years after the author's death").

[137] National Center for Health Statistics, CENTS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nchs/fastats/life-expectancy.htm (last visited Oct. 26, 2017).

[138] *Compare* Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, *with* 17 U.S.C. § 304(a).

[139] *See* transition evidenced in Parts II–IV.

[140] U.S. CONST. art. I, § 8, cl. 8.

[141] *Id.*

[142] Eldred v. Ashcroft, 537 U.S. 186, 205–06 (2003); Sonny Bono Copyright Term Extension Act, Pub. L. No. 105–298, § 104, 112 Stat. 2827 (1998).

continued . . .

protection term is the life of the author plus seventy years.[143] This term extension evidences Congresses' blatant disregard for the Constitution's Limited Times provision. The CTEA represents empirical evidence that businesses have a disturbing amount of political clout when it comes to influencing copyright protection laws.[144]

In 1998, Disney, who had a considerable number of valuable copyrights that were about to expire, called upon Congress for help.[145] One of these copyrights was a 1928 cartoon called "Steamboat Willie" that starred "Mickey Mouse."[146] Disney lobbied Congress using considerable amounts of money to try and ensure the passage of the CTEA.[147] The influence did not stop just with money spent on lobbying.[148] As identified by an Associated Press article, Disney held tremendous political clout.[149]

> In addition to its face-to-face lobbying campaign, Disney made campaign contributions. Of the 13 initial sponsors of the House bill, 10 received contributions from Disney's political action committee. The largest donations, $5,000 each, went to Coble and Rep. Howard Berman (D-Calif.), a senior member of the Judiciary Committee. On the Senate side, eight of the 12 sponsors received Disney contributions. Judiciary Committee Chairman Orrin Hatch (R-Utah), the bill's chief sponsor, received $6,000, second only to Democratic Sen. Barbara Boxer, who represents Disney's home state of California and who is up for re-election this fall. Disney gave $1,000 to Lott on June 16, the day he signed up as a bill co-sponsor and a week after Lott met with Eisner.[150]

---

[143] 17 U.S.C. § 302 (2012).

[144] *See supra* note 149 and accompanying text.

[145] *See* Phyllis Schlafly, *Why Disney Has Clout with the Republican Congress*, EAGLE FORUM (Nov. 25, 1998), http://www.eagleforum.org/column/1998/nov98/98-11-25.html.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *See Disney Lobbying for Copyright Extension No Mickey Mouse Effort*, CHI. TRIBUNE (Oct. 17, 1998), http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/commentary/ChiTrib10-17-98.html.

[150] *Id. See also*, Allen K. Ota, *Disney In Washington: The Mouse That Roars*, CNN (Aug. 10, 1998), http://edition.cnn.com/ALLPOLITICS/1998/08/10/cq/disney.html ("Nevertheless, the Disney empire opened an office and hired lobbyists in Washington in 1990, and it has become an influential force on legislation. Among

continued . . .

Furthermore, Phyllis Schlafly stated that the campaign contributions of Disney's Political Actions Committee "totaled [sic] $95,805 to Democratic Members of Congress and $53,807 to Republican Members, in addition to in-kind contributions."[151] The CTEA pitted large businesses like Disney and Time Warner against less funded consumer groups and libraries.[152] This fight essentially froze the public domain from receiving any new published works.[153] However, the public domain did receive a large influx of material on January 1, 2003 due to 17 U.S.C. § 303.[154] The influx of material consisted of unpublished works and not the inspirational works that many seek for creativity.[155] Congress made it more difficult for creators to find new and innovative expressions because only a minimal amount of works

its activities: 1. It is one of the top media conglomerates contributing to political campaigns. Recipients of campaign money include members of key committees such as Sen. Patrick J. Leahy, D-Vt., a family friend of Eisner and ranking Democrat on the Judiciary Committee, and Rep. Howard Coble, R-N.C., chairman of the Judiciary Subcommittee on Arts and Intellectual Property, which oversees copyright issues. It has contributed nearly $800,000 to political campaigns in the 1997–98 cycle. [2.] It has courted members of the congressional delegations from California and Florida, where its theme parks pump billions of dollars a year into local economies in Orlando, Fla., and Anaheim, Calif. [3.] It has begun a major reorganization that will combine the lobbying firepower of Disney and its subsidiary ABC Inc., under Preston Padden, who left his job as president of ABC Television Network Inc. to take over the task of upgrading Disney's lobbying operation. Disney spent more than $1.5 million on lobbying last year. [4.] It took a leading role in Hollywood in promoting closer ties to Republican leaders to help move legislation. On June 29, three weeks after Eisner's meeting with Lott, Disney sent John F. Cooke, executive vice president for corporate affairs, to a meeting hosted by another major Hollywood company, Universal Studios, a subsidiary of The Seagram Co. Ltd., in Studio City, Calif., to discuss legislation with Speaker Newt Gingrich, R-Ga., and Reps. David Dreier and Mary Bono, both from California. In February, the company paid $2,700 to host Gingrich and his wife, Marianne, for three days at Disney Institute, the company's educational facility in Orlando. Gingrich gave a speech and visited Disney's new Animal Kingdom theme park.").

[151] *See* Schlafly, *supra* note 145.

[152] *See id.*

[153] *See* R. Anthony Reese, *Public but Private: Copyright's New Unpublished Public Domain,* 85 TEX. L. REV. 585, 586 (2007) (explaining the 2003 influx of unpublished material into the public domain).

[154] 17 U.S.C. § 303(a) (2012) ("Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047.").

[155] *See* Reese, *supra* note 153, at 586, 604–06 (explaining the types of work that entered the public domain as a result of 17 U.S.C. § 303 and the effects on museums, scholars, publishers, and the like that are concerned with creativity).

continued . . .

will enter the public domain for twenty years.[156] It seems that Congress's decision, to extend the copyright terms, had less to do with the need to align the United States with an international treaty, and had more to do with the influence that Hollywood and media giants had on Capitol Hill.[157]

Congress's reasoning for the copyright extension can be found in the speeches given from the floor of the Senate on October 7, 1998 by Mr. Leahy, Mr. Thurmond, and Mr. Kennedy.[158] These representatives all proclaimed their support for the bill.[159] They argued that the United States must protect our authors and creators from European countries that have already passed term extensions to their copyright acts.[160] Congress proclaimed that the United States needed to harmonize its copyright law with that of foreign nations.[161] In Congress's view, it

[156] *See id.* at 586.

[157] *See* Dennis S. Karjala, *Judicial Review of Copyright Term Extension Legislation*, 36 LOY. L.A. L. REV. 199, 203–04, 212 (2002). The progress of science and the useful arts would dictate the need for new works to enter the public domain to help fuel new works. Dennis S. Karjala, *The Term of Copyright*, *in* GROWING PAINS, ADAPTING COPYRIGHT FOR EDUCATION AND SOCIETY (1997) http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/commentary/term-of-protection.html#N_*_. When the public domain is put on hold, future works and society in general are the ones who suffer the consequences. *See id.*

[158] 144 CONG. REC. S11,672–75 (1998). *See also* COPYRIGHT TERM EXTENSION ACT OF 1996, 104 S. REP. NO. 104–315, at 3 (1996) ("[The purpose of the copyright term extension was] to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works. The bill accomplishes these goals by extending the current U.S. copyright term for an additional 20 years. Such an extension will provide significant trade benefits by substantially harmonizing U.S. copyright law to that of the European Union while ensuring fair compensation for American creators who deserve to benefit fully from the exploitation of their works. Moreover, by stimulating the creation of new works and providing enhanced economic incentives to preserve existing works, such an extension will enhance the long-term volume, vitality, and accessibility of the public domain.").

[159] 144 CONG. REC. S11,672–75 (1998).

[160] *Id.*

[161] However, consider the following rebuttal of this so-called harmony:

> There are many weaknesses in this claim of "harmonization," all suggesting that it cannot support the scope of the change that the CTEA advances. 1. As the difference between the Berne Convention and the EU Directive suggests, the choice to harmonize on the EU standard is a choice to deviate from the Berne standard. In some cases, then, our law may become more in line with the EU, but it simultaneously becomes less in line with the practice in other nations, such as Asian countries. *See, e.g.,* 3A Steven Z. Szczepanski, *Eckstrom's Licensing in Foreign and Domestic Operations* § 31.07 (term of Japanese copyright protection is life-plus-50 years for individual authors and 50 years for works for hire). This does not advance harmonization. 2. More fundamentally, the CTEA actually *increases* disharmony with respect to

continued . . .

would be unfair for American authors to receive a shorter copyright term than that of our European counterparts.[162] Clearly Congress ignored the most important side of this two-sided battle. How would this extension affect creation?

Considering the freeze on working entering the public domain and the minute gain actually realized by authors, it is clear that this extension was not granted to promote science and the useful arts. Congress exceeded its constitutional power when it enacted this legislation.[163] The parties who were injured by this unconstitutional extension were

---

certain authors, certain kinds of work, and some works in particular. The CTEA increases disharmony, for example, with respect to "corporate authors." The EU offers "corporate authors" (in countries like the United States where that concept is recognized) a term of protection for 70 years. The CTEA would expand the term of protection for "corporate authors" to 95 years (or 120 years if the work is unpublished). *See* Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 23 COLUM.-VLA J.L. & ARTS 137, 172 (1999). 3. The CTEA also increases disharmony with respect to certain types of works. After the CTEA, the United States will provide longer protection for photographers, creators of applied art, broadcasters, sound recording and film producers than the European Union. N. W. Netanel, *Copyright and Democratic Civil Society,* 106 YALE L.J. 283, 367 (1996). 4. Finally, the CTEA increases disharmony with respect to certain individual works. As Professor Dennis Karjala testified before Congress, under existing law, the works of George Gershwin were about as "harmonized" as they could be. Gershwin died in 1937, so his entire oeuvre goes into the public domain in Europe no later than 2008, no matter what we do here. Prior to the CTEA, his works were scheduled to enter the public domain in the United States during the period 1999 to 2013. Now, under the CTEA they will enter the public domain in 2019–2033. Dennis S. Karjala, *Statement of Copyright and Intellectual Property Law Professors in Opposition to H.R. 604, H.R. 2589, and S. 505, "The Copyright Term Extension Act": Submitted to the Senate and House Committees on the Judiciary*, 105th Cong. 16 (1998). Thus for at least 11 years, Europeans will have the benefit of free access to one of America's greatest composers while Americans will not. "Harmonization" is therefore a red herring in this case. The CTEA does not harmonize.

Brief of Appellant at 44–45, Eldred v. Ashcroft, 255 F.3d 849 (D.C. Cir. 2001) (No. 99–5430).

[162] This argument was addressed by Senator Leahy in his comments on the Senate floor. 144 CONG. REC. S11,672 (1998) (noting that Mr. Leahy quoted Carlos Santana who said, "As an American songwriter whose works are performed throughout the world, I find it unacceptable that I am accorded inferior copyright protection in the world marketplace.").

[163] The limited times provision was intended to limit the monopoly on rights. *See* Craig W. Dallon, *Original Intent and the Copyright Clause: Eldred v. Ashcroft Gets it Right*, 50 ST. LOUIS U. L.J. 307, 340–341 (2006). But Congress and Justices in the Supreme Court understand this Limited Times provision to only require a definitive amount of time. *See generally* Eldred v. Ashcroft, 537 U.S. 186 (2003) (discussing the Limited Times provision).

continued . . .

the American public and future creators.[164] Without access to giant's shoulders for our authors to stand on, our creativity has been essentially stunted. Because of this, the public domain will continue to remain stagnant until the release of new published works in 2018.[165]

VI. WE WOULD LIKE TO PUNT THIS ISSUE: THE SUPREME COURT'S ABILITY TO AVOID THE QUESTION

The Supreme Court, in *Eldred v. Ashcroft,* [166] reviewed the constitutionality of the CTEA as to whether Congress had violated the "limited times" provision, as well as the First Amendment issue surrounding removal of pre-CTEA public domain works. [167] The Court's prior holdings established the public policy of promoting creation rather than fairness to authors.[168] These prior holdings would lead one to believe that the Court would find this extension unconstitutional. [169] However, writing for the majority, Justice Ginsburg rejected petitioner's arguments that the extension was unconstitutional. [170] Justice Ginsburg noted that since there was a statutory term of seventy years, the time was not unlimited,[171] and "[t]he CTEA's baseline term of life plus 70 years . . . qualifies as a 'limited

[164] *See* Patrick H. Haggerty, *The Constitutionality of the Sonny Bono Copyright Term Extension Act of 1998*, 70 U. CIN. L. REV. 651, 679 (2002) ("The retrospective extension of copyright terms harms the public domain by keeping works out of the public's reach.").

[165] Laura N. Gasaway, *A Defense of the Public Domain: A Scholarly Essay*, 101 L. LIB. J. 451, 457 (arguing that creators "might have enjoyed a revival, but this now will not occur before the end of 2018").

[166] Eldred v. Ashcroft, 537 U.S. 186 (2003).

[167] *Id.* at 193.

[168] *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 663–64 (1834) (recognizing that copyright was purely a statutory right and not a natural right so that any notion of fairness to the author, especially when it comes to extending the term of a monopoly, is well beyond the scope of the copyright clause). *See also*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 n.10 (1984) ("The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings." (quoting H.R. REP. NO. 2222, at 7 (1909)). *See also* Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 580 (1985) (quoting the same section of H.R. REP. NO. 2222).

[169] *Compare Wheaton*, 33 U.S. (8 Pet.) at 663–64, *and Sony Corp. of Am.*, 464 U.S. at 429 n.10, *and Harper & Row Publishers, Inc.*, 471 U.S. at 580, *with Eldred*, 537 U.S. at 194.

[170] *Eldred*, 537 U.S. at 194.

[171] *Id.* at 199.

continued . . .

Tim[e]' . . . ."[172] Justice Ginsburg evaded the bigger question by framing the issue as whether Congress violated the Limited Times provision in making the extension retroactive, therefore clawing-back already expired copyrights from the public domain.[173] She wrote, "Guided by text, history, and precedent, we cannot agree with petitioners' submission that extending the duration of existing copyrights is categorically beyond Congress' authority under the Copyright Clause."[174] With the focus on whether the removal of copyrights from the public domain was against the Limited Times provision,[175] the Court successfully punted the real issue of whether Congress exceeded its power by continuously extending the copyright term limits beyond a true limited time.[176]

Curiously enough, not all of the Supreme Court Justices were in agreement. There were two dissents: one by Justice Stevens, and the other by Justice Breyer.[177] Justice Stevens recognized that this extension completely missed the point of the Copyright Clause in the Constitution.[178] He stated, "By failing to protect the public interest in free access to the products of inventive and artistic genius—indeed, by virtually ignoring the central purpose of the Copyright/Patent Clause—the Court has quitclaimed to Congress its principal responsibility in this area of the law."[179] In his view, the claw back of copyrights from the public domain should have never taken place because it was unconstitutional for Congress to enact a retroactive copyright extension.[180] He further stated that "[t]he reason for increasing the inducement to create something new simply does not apply to an already-created work."[181] The two-step constitutional ends-and-means process, to promote science with incentives, is not effective when it is completely removed from logic.[182] How would retroactive extension promote or encourage more creation?[183] Even if the extensions were constitutional, all new creations would receive the new incentive; therefore, there is no need to apply retroactive extensions.[184] Stevens

[172] *Id.*
[173] *Id.* at 198.
[174] *Id.* at 204.
[175] *Id.* at 199–208.
[176] *See id.* at 222–23 (Stevens, J., dissenting).
[177] *Id.* at 222, 242 (Stevens, J., dissenting) (Breyer, J., dissenting).
[178] *Id.* at 222–23 (Stevens, J., dissenting).
[179] *Id.* at 242.
[180] *Id.*
[181] *Id.* at 240.
[182] *Id.*
[183] *See id.*
[184] *Id.*

continued . . .

argued that the majority missed the mark on both issues of the constitutionality of the Limited Times extension and the retroactive claw back.[185]

Justice Breyer's dissent argued that the extension was in essence a perpetual monopoly.[186] He wrote, "[t]he economic effect of this 20 — year extension — the longest blanket extension since the Nation's founding — is to make the copyright term not limited, but virtually perpetual." [187] He understood the fundamental principal behind allowing government protected monopolies. [188] He continued by stating, "And most importantly, its practical effect is not to promote, but to inhibit, the progress of 'Science' — by which word the Framers meant learning or knowledge."[189] Acknowledging that this extension neither promoted science nor incentivized authors, especially those with existing copyrights, Justice Breyer agreed with Justice Stevens that the CTEA was unconstitutional because Congress went beyond its constitutionally prescribed limits.[190]

Overall, the majority in *Eldred* basically upheld a copyright extension based on the idea of natural rights for copyright holders.[191] The purpose of the CTEA was based predominately on economics and fairness to domestic authors.[192] Congresswoman Mary Bono, widow of the late Sony Bono, [193] expressed the manner in which many congressional representatives actually think about copyright by stating:

> Actually, Sonny [Bono] wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws

[185] *Id.* at 222–23.
[186] *See id.* at 243.
[187] *Id.*
[188] *Id.*
[189] *Id.* at 243–44.
[190] *Id.* at 243, 267.
[191] *See id.* at 195.
[192] *The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Comm. on the Judiciary*, 104th Cong. 1 (1995) (testimony of Senator Orrin Hatch) ("This bill is important to the United States in each of its many roles: as a creative and cultural community, as a world economic leader, as an international trader, and as a country that values basic fairness. This bill is important to strengthen the economic incentives to our creators, to maintain our international trading position, to protect our investment in intellectual property, and to help preserve our own culture.").
[193] Emily Heil, *Former Congresswoman Mary Bono Weds Former Astronaut*, WASH. POST (Sept. 29, 2015), https://www.washingtonpost.com/news/reliable-source/wp/2015/09/29/former-congresswoman-mary-bono-weds-former-astronaut/?utm_term=.f43c126b9a0d.

continued . . .

> in all of the ways available to us. As you know, there is also Jack Valenti's proposal for [the] term to last forever less one day. Perhaps the Committee may look at that next Congress.[194]

Furthermore, Congress claimed it was harmonizing United States copyright law with that of the international community.[195] This is clearly wrong as many sections of the CTEA actually created larger disparities between international copyright law and our own.[196] By attempting to align United States copyright law with that of the European Union (EU), which only consists of twenty-eight countries, rather than the Berne convention, which consists of 175 total contracting parties, the disparity between the United States and the rest of the world was furthered.[197] It further defies logic to claim that the United States should align its copyright law with that of foreign nations, when the extension really alienated the United States from a larger number of nations.[198] It is clear that Congress had a poor understanding of the history and the constitutional purpose of copyright law.

VII. RECENT SHIFT IN COPYRIGHT PROTECTION: TOWARDS A MORE PUBLIC CENTERED REGIME

It seems that we may not be able to rely on Congress to interpret the Constitution in the way it was intended by the Framers. Furthermore, with the Supreme Court's history of upholding congressional enactments relating to copyright,[199] hope seems to be lost with the Supreme Court as well. But with the recent case of *Kirtsaeng v. John Wiley & Sons, Inc.*,[200] hope may begin to seep back into the hearts of those who see copyright as a statutorily created right, and not an inherent natural right.

With many advocates demanding a reading of copyright law that

---

[194] 144 CONG. REC. H9952 (daily ed. Oct. 7, 1998) (alteration in original).

[195] *Id.* at 9950.

[196] *See, e.g.*, Michael R. Klipper, *Committee No. 301 – Copyright Legislation, in* AMERICAN BAR ASSOCIATION SECTION OF INTELLECTUAL PROPERTY LAW 2002–2003 16–17 (Brian E. Banner ed. 2003).

[197] *See Countries*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/countries_en (last visited Oct. 27, 2017); *WIPO-Administered Treatises*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15 (last visited Oct 9, 2013).

[198] *See* B. Zorina Khan, *An Economic History of Copyright in Europe and the United States*, EH, https://eh.net/encyclopedia/an-economic-history-of-copyright-in-europe-and-the-united-states/ (last visited Oct. 27, 2017).

[199] *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 222–23 (2003).

[200] *See* Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519 (2013).

continued . . .

more closely resembles the intent of the Framers,[201] it may seem that we have turned a corner with the recent holding in *Kirtsaeng*.[202] Strengthening the first sale doctrine and applying it to foreign book purchases,[203] the Supreme Court held that United States copyright holders could not use their monopoly to ban importation of copyrighted materials that were legally purchased abroad.[204] This ruling has effectively weakened geographic distribution walls based upon advantageous monetary policies.[205] A publisher can no longer keep a legally acquired copy of its book out of the United States just because that copy was purchase at an eighty percent discount in a foreign country.[206]

In *John Wiley & Sons, Inc. v. Kirtsaeng*, Kirtsaeng was a student attending school in California.[207] He was originally from Thailand.[208] While in school, Kirtsaeng received international edition textbooks that were markedly cheaper than the United States editions.[209] Kirtsaeng began selling these books on eBay.[210] John Wiley & Sons, Inc., the publisher and copyright holder of the books Kirtsaeng sold, brought suit against Kirtsaeng for copyright infringement.[211] The books imported by Kirtsaeng had the following disclaimer on the inside covers:

> This book . . . may not be exported. Exportation from or importation of this book to another region without the Publisher's authorization is illegal and is a violation of the Publisher's rights. The Publisher may take legal action to enforce its rights. The Publisher may recover

---

[201] *See generally* Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1166 (2000) (discussing the intent of the Framers).

[202] *Kirtsaeng*, 568 U.S. at 520 (upholding the first sale doctrine against importation ban of lawfully obtained books abroad).

[203] John C. Paul et al., *U.S. Supreme Court Holds that Books Printed and Sold Abroad May Be Freely Resold in the U.S. Because the Copyrights Are Exhausted Under the First-Sale Doctrine*, FINNEGAN (Mar. 26, 2013), https://www.finnegan.com/en/insights/u-s-supreme-court-holds-that-books-printed-and-sold-abroad-may.html?news=c1f2dd31-f4f9-49ea-a133-f831c47a6515.

[204] *See Kirtsaeng*, 568 U.S. at 525.

[205] *See id.* at 544.

[206] *See id.* at 525.

[207] John Wiley & Sons, Inc. v. Kirtsaeng, Civil Action No. 08 Civ. 7834(DCP), 2009 WL 3364037, at *2 (S.D.N.Y. Oct. 19, 2009), *aff'd*, 654 F.3d 210 (2d Cir. 2011), *rev'd and remanded*, 568 U.S. 519 (2013).

[208] *Id.*

[209] *Id.*

[210] *Id.* at *1.

[211] *Id.* at *2.

continued . . .

> damages and costs, including but not limited to lost profits and attorney's fees, in the event legal action is required.[212]

John Wiley & Sons, Inc., by adding this disclaimer, was acting pursuant to its interpretation of the importation ban that is codified in 17 U.S.C. § 602(a)(1)[213] which states:

> Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501.[214]

In defense, Kirtsaeng raised the first sale doctrine,[215] which is codified in 17 U.S.C. § 109(a), and states that "[n]otwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."[216]

Writing for the Supreme Court, Justice Breyer, one of the dissenters in *Eldred*, reversed the lower court's decision.[217] The lower court held that the first sale doctrine was not applicable to books manufactured abroad.[218] In reversing the lower court's decision, the Court held that the first sale doctrine applies to copyrighted material lawfully acquired abroad.[219] One of the issues in this case was the interpretation of the phrase "lawfully made under this title."[220] The Court had to decide whether this phrase included a geographic limitation on the first sale doctrine[221] or if it implied only a compliance standard with the United States Copyright Act.[222] Under the compliance standard theory, copyrights that are made under, and in compliance with, the United States Copyright Act will have the first sale doctrine defense

[212] Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 526 (2013).
[213] *Id.* at 559.
[214] 17 U.S.C. § 602(a)(1) (2012).
[215] *Kirtsaeng*, 568 U.S. at 519–520.
[216] 17 U.S.C. § 109(a) (2012).
[217] *Kirtsaeng*, 568 U.S. at 530.
[218] *Id.*
[219] *Id.*
[220] *Id.* at 525.
[221] *Id.* at 528.
[222] *Id.* at 529–30.

continued . . .

available.[223] Therefore, any legally acquired copyrighted material obtained outside the United States would be considered made in compliance with the United States Copyright Act, and a publisher of those books could not claim that the first sale doctrine does not apply.[224] Conversely, if the court read a geographic limitation into the first sale doctrine, only copyrights that were first sold in the United States could be resold within its borders without the publisher's permission.[225]

The Court read the phrase "lawfully made under this title" to distinguish lawfully acquired copies from unlawfully acquired copies, and therefore, only a compliance standard was intended by the phrase.[226] Justice Breyer stated, "Thus, the nongeographical reading is simple, it promotes a traditional copyright objective (combating piracy), and it makes word-by-word linguistic sense."[227] The Court said that it would be linguistically more difficult to attempt to fit a geographical limitation into the interpretation.[228] For these reasons, the Court reversed and remanded.[229]

This case was a victory for those who encourage freedom of information. The effect of this case allows information to be disseminated more widely without forcing Americans to pay higher costs for the same information.[230] This essentially prevents publishers from forcing higher costs for information based on the location of the first purchase.[231] Surprisingly, the Court did not uphold a further expansion of copyright — not to say some Justices did not try.[232]

But how much faith can we put in this decision? It was a 6–3 decision.[233] Why was this outcome different than the one in *Eldred*? One reason may be the fact that different justices now occupy the bench.[234] The leftover Justices held their old line of reasoning, with the sole exception of Justice Thomas.[235] What this suggests is that we are

---

[223] *Id.* at 530.
[224] *Id.*
[225] *Id.* at 529–30.
[226] *Id.* at 530.
[227] *Id.*
[228] *Id.* at 530–31.
[229] *Id.* at 552.
[230] *See generally id.* (holding that the first sale doctrine did not apply).
[231] *Id.* at 552.
[232] *See id.* at 557–58 (Ginsberg, J., dissenting).
[233] *See id.* at 522.
[234] Among all of the Justices, only Justice Thomas switched sides in this case. *See id.* The old majority in *Eldred* dissented in this case, excluding those who left the bench. *See id.*
[235] *Compare id.* at 525 (holding that the first sale doctrine, as codified in the Copyright Act, applies to copies of copyrighted works lawfully made abroad), *with* Eldred v. Ashcroft, 537 U.S. 186, 187 (2003) (ignoring the real issue of whether

continued . . .

unable to rely on the Supreme Court for a true interpretation of the Framers' intent behind including an Intellectual Property clause in the Constitution. With only a simple change of Justices, there could be a reversal in the interpretation of the first sale doctrine.[236] Additionally, smaller players are unable to compete with big businesses to get the necessary attention and support of Congress.[237] What do we do?

VIII. SOLUTIONS

With an eye to available information and history, our legislative and judicial branches could create a better chance of success with the next copyright act. In my opinion, the next copyright act will start taking shape soon and may be finished by the end 2018[238] because this is when the public domain will start to receive new works from expired copyrights.[239] If the act is not completed by 2018, the next logical milestone will be 2023. This year, in my opinion, will prove to be a significant year in copyright because this is when Disney's Mickey Mouse copyright is set to expire, yet again.[240] Without a clear historical understanding of United States copyright law, we will continue to travel down the wrong path.[241] With that said, I have a few suggestions that would create a more knowledge-driven approach to intellectual property, which would depart from the current approach that is centered on the copyright holder.

congress exceeded its power by continuously extending the copyright term limits beyond a true limited time).

[236] *See Kirtsaeng*, 568 U.S. at 522 (exemplifying a reversal in the Court's interpretation after Rehnquist, C.J., O'Connor and Souter, J.J., left the Court).

[237] Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC (Apr. 20, 2015), https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/.

[238] *See generally* Cory Doctorow, *We'll Probably Never Free Mickey, But That's Beside the Point*, ELECTRONIC FRONTIER FOUND. (Jan. 19, 2016), https://www.eff.org/deeplinks/2016/01/well-probably-never-free-mickey-thats-beside-point (noting that the early Mickey Mouse cartoons' copyrights will end in 2018).

[239] *See id.*

[240] *See id.*

[241] If we look to the period before the Statute of Anne, we can see many of the same attributes — though to a lesser extreme — that caused the Statute of Anne to be enacted. *See Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RES. LIBRS., http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.WfDX3tenHIU (last visited Oct. 25, 2017).

continued . . .

A. Term Limits

The simplest solution that would be most consistent with the Constitution would be to revert copyright term limits back to 1831 or 1909 terms, meaning a maximum term of 42 or 56 years, respectively.[242] This would ensure that there would be a timely entrance of new expressions into the public domain.[243] This timely lapse into the public domain is very important in order to widely disseminate knowledge.[244] For example, the publishers of the Harry Potter books are in the business of selling books to make money.[245] In turn, they attempt to market the book to everyone, but at a price that some are not able to afford.[246] Since the author, J. K. Rowling, has transferred her publication rights to the publisher, she no longer has control over the price of her books;[247] and here lies the problem. The dissemination of this book is controlled by money.[248] Only when this book enters into the public domain, will the book have the ability to reach its maximum audience.[249] Once this

[242] *See id.*

[243] *See* Eldred v. Ashcroft, 537 U.S. 186, 222, 227 (2003) (Stevens, J., dissenting) (emphasizing that Congress may not "extend the life of a [copyright] beyond its expiration date" to promote "the twin purposes of encouraging new works and adding to the public domain").

[244] *See* David E. Shipley, *Congressional Authority Over Intellectual Property Policy After Eldred v. Ashcroft: Deference, Empty Limitations, and Risks to the Public Domain*, 70 ALB. L. REV. 1255, 1262–63 (2007) (explaining that term limits should ultimately encourage creative activity to "guarantee[] that those innovations will enter the public domain," and that extending copyright terms instead inhibits this goal (quoting Eldred, 537 U.S. at 223)). *See also* Vaishali Khatri, *Following an International Copyright Regime at a Large National Cost: Is it Worth it?*, 6 J. BUS. ENTREPRENEURSHIP & L. 131, 147 (2012) ("The Framers purposely imposed specific limits on Congress's power in regards to copyright law in order to ensure it would promote, not inhibit, the diffusion of knowledge.").

[245] *See* Thomas A. Mitchell, *State of the Art(s): Protecting Publishers or Promoting Progress?*, 12 RICH. J.L. & TECH. 7, 2 (2005).

[246] *See id.* ("Publishers are business[es] that want to maximize their profits . . . and charge as much as possible for each copy to the public . . . The public wants creative works at the lowest possible price, and therefore wants both publishers and authors to get less payment for each copy. Each party has incentives to both promote and curtail the interests of the others.").

[247] *See id.* at 14 (explaining that, because publishers can obtain an entire copyright from authors, the CTEA allows publishers to gain monopoly power that "shift[s] the status of copyright from a balance between authors, publishers, and the public, to a preference for publishers").

[248] *See id.* at 3.

[249] Paul Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers*, 92 MINN. L. REV. 1031, 1032 (2008).

continued . . .

book enters into the public domain, it will be free for anyone to copy,[250] thus, creating a secondary market for cheaper books.[251] Dissemination of the book's information would then be widespread due to the ease and low cost of the book.[252]

With only a 42 or 56-year time limit, people who are living when the book is first published will have the chance to enjoy the book when it is available in the public domain. Even though this approach seems to be the best, and ideally it is, it may never come to fruition. Unless the Supreme Court is willing to step in and declare both the CTEA and the 1976 Copyright Acts partially unconstitutional, Congress may never change these limits. Congress's decision-making is clouded by the fairness argument that places intellectual property on the same footing as natural property.[253] Moreover, without a large financial backing, support for following the original constitutional intent behind copyright protection may never be taken seriously by Congress.[254]

B. Reinstate the Renewal Requirement

The renewal process found in every copyright act from 1790 until 1976 helped the natural flow of works to enter the public domain.[255] If an author was not willing to renew his copyright, or the creation was just not that profitable, allowing the copyright to lapse and enter the public domain helped the progress of science for those who could build upon the author's work.[256] Even though the renewal process was abandoned due to the Berne Convention requirements,[257] it is more important to ensure the progress of science and the useful arts for the welfare of society rather than ensure riches to a few.

C. Reversionary Clause

With the conflation of authors and copyright holders, a more author-focused copyright act may eliminate many of the ill effects found in our current copyright law. With an inalienable reversionary clause in the new copyright act, authors will have the ability to retake control of their copyright. It is believed that a copyright holding author, unlike a

[250] *Id.*

[251] *See id.* at 1048 n.57.

[252] *See generally id.* at 1040 (noting that public domain books are available at a higher rate than copyrighted books).

[253] Dallon, *supra* note 9, at 437 n.458.

[254] *Id.* at 437.

[255] *See id.* at 366.

[256] *Id.* at 365.

[257] *See id.* at 438.

continued . . .

business, would be more sympathetic to nominal infringers. This would ameliorate many of the harsh effect felt by immaterial infringers.[258] Businesses on the other hand, have a duty to owners and shareholders to squeeze every penny out of their assets,[259] and it could be a breach of their fiduciary duties to allow any type of infringement on a currently held copyright.[260] Unlike a business, an author does not have such constraints. With a reversionary clause for a period of twenty years, requiring authors to take back their copyrights, the author could then make the decision of whether to hold onto or alienate the copyright again.[261] Moreover, a reversionary clause would also protect an author's work in an instance where a publisher uses their copyrighted work in a fashion that would go against the very meaning of what the copyright was intending to convey. In this example, the author could retake control of the copyright at the end of the reversionary period and disseminate accordingly.[262]

D. Copyright Infringement Exoneration Clause

An inalienable exoneration clause, held by an author, would also further resolve infringement suits and encourage creation. This clause would allow an author or creator to exonerate an infringer for certain infringements.[263] This right would remain with the author even after

[258] *See generally* Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329 (2010) (discussing termination rights).

[259] Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 413 (2006).

[260] *See* Irah H. Donner, *Fiduciary Duties of Directors When Managing Intellectual Property*, 14 NW. J. TECH. & INTELL. PROP. 203, 205 (2016) ("If a director or a board of directors fails to adequately manage a corporation's intellectual property assets, they could be deemed to have breached their fiduciary duty to the corporation.").

[261] *See* Peter S. Menell & David Nimmer, *Pooh-Poohing Copyright Law's "Inalienable" Termination Rights*, 57 J. COPYRIGHT SOC'Y U.S.A. 799, 804–05 (2009) (noting that reversionary interests are inalienable and that an author has a right to renew a copyright).

[262] *See* BJ Ard, *Notice and Remedies in Copyright Licensing*, 80 MO L. REV. 313, 321 (2015) (stating that a publisher infringes an author's copyright by violating the terms of the agreement or exercising rights that were never granted).

[263] *See generally* Charles Bryan Baron, *Self-Dealing Trustees and the Exoneration Clause: Can Trustees Ever Profit form Transactions Involving Trust Property?*, 72 ST. JOHN'S L. REV. 43, 57 (discussing exoneration or exculpatory clauses in the context of trusts, which a settlor may utilize to allow the trustee to personally benefit from otherwise voidable self-dealing transactions involving the trust property).

continued . . .

the copyright had been assigned.[264] Of course this clause would need to have limitations, as an author should not allow an infringer to completely copy a copyrighted work. A good example would be exonerating a derivative work.[265] The author would have the ability to exonerate for this type of infringement even if the copyright holder refuses consent.[266]

By permitting the author of the work to accept certain uses that could be considered infringements, society would benefit from the expansion of newly created works.[267] Conversely, if we continue to allow businesses to maintain their current level of oversight of intellectual property works, we essentially authorize businesses to control knowledge and creativity.

IX. CONCLUSION

Most of the solutions presented above grant rights that the author could not alienate. As recognized by the English Crown, when it enacted the Statue of Anne, there is a need to control duress and unequal bargaining power between businesses and authors.[268] If an author has the ability to sign away their rights, and a business views those rights as profitable, then the business will require those rights to be assigned when a publication agreement is made. Many authors only want to be heard and would prefer wide dissemination to profits.[269] Businesses, on the other hand, need to make a profit to perpetuate their existence.[270] This profit-driven model, in many ways, conflicts with the intended

[264] *Id.*

[265] *See* Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 210 (1982) (defining "derivative work" as "a work based on one or more preexisting works", including translation, dramatization, fictionalization, reproduction, abridgement, or condensation of an original work).

[266] *See* Baron, *supra* note 263, at 57.

[267] *See* Davida H. Isaacs, *The Highest Form of Flattery? Application of the Fair Use Defense Against Copyright Claims for Unauthorized Appropriation of Litigation Documents,* 71 MO. L. REV. 391, 415 (2006) ("There is a strong argument for concluding that the economic windfall provided by copyright law is not intended to protect any purported 'property rights' of authors, but rather to benefit society by encouraging new original, creative works.").

[268] *See supra* Part II (discussing the political, social, and economic climate in England which led to the passing of the Statute of Anne).

[269] Hillary Casavant, *Don't Write for the Money*, WRITER (Jan. 27, 2014), https://www.writermag.com/2014/01/27/dont-write-money/ ("I have interviewed dozens of authors for The Writer, and I always ask, 'Why do you write?' While the answers vary, not a single one has answered, 'To make money.' I suspect the same goes for those authors cashing million-dollar paychecks. When they first put pen to paper, they did not write for a living. They write because they love to.").

[270] ALBERT N. LINK & MICHAEL B. BOGER, THE ART AND SCIENCE OF BUSINESS VALUATION 11 (1999).

continued . . .

purpose of the Intellectual Property Clause and the idea of societal betterment through the dissemination of knowledge. However, it must be recognized that only a large publisher may get authors the exposure they desire,[271] hence, the need for author-focused protection to level the playing field between the contracting parties.

To obtain these protections, Congress must understand the original purpose for protecting intellectual property. Congress is constructed of hundreds of human beings who, by their very nature, are motivated by self-perpetuation. [272] Unless a constituent can ensure reelection, congressmen and congresswomen will continue to back those who have money, power, and who can better their chances of reelection.[273] Only by addressing these concerns, understanding the cyclical history that we are on track to repeat, identifying Congress as legislators who are driven more by political contributions than constitutional rights, [274] and recognizing the mistaken attachment of natural property rights to intellectual property,[275] can we begin to rewrite our next copyright act to ensure its compliance with its constitutionally prescribed purpose.

[271] MONICA SEEBER & RICHARD BALKWILL, MANAGING INTELLECTUAL PROPERTY IN THE BOOK PUBLISHING INDUSTRY 30 (2007), http://www.wipo.int/edocs/pubdocs/en/copyright/868/wipo_pub_868.pdf.

[272] DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5–6 (1974).

[273] *See* Alina Ng, *Copyright and Moral Norms*, 14 LOY. J. PUB. INT. L. 57, 61 (2012) ("Copyright law, which attempts to address many divergent interests in creative works, may then be inadvertently used to further congressional policies in favor of particular interest groups over others.").

[274] Robert P. Beard, *Whacking the Political Money "Mole" Without Whacking Speech: Accounting for Congressional Self-Dealing in Campaign Finance Reform After Wisconsin Right to Life*, 2008 U. ILL. L. REV. 731, 762–63 (2008).

[275] Dallon, *supra* note 9, at 453–54.