

WHY CAN'T MY WAITER SING HAPPY BIRTHDAY: THE CHILLING EFFECT OF CORPORATE COPYRIGHT CONTROL

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ABSTRACT

In 2015, a lawsuit surrounding the copyright protection of the classic tune “Happy Birthday to You” resulted in the court concluding that a corporation who asserted ownership interest in the song never had a valid copyright to claim. For decades, the song considered to be an American folklore was no longer restricted by a corporation controlling its dissemination. This is not an isolated incident, but instead a norm in copyright. Therefore, a change must be made in copyright protection in order to justify the limited monopoly, as the current system does not promote progress of the useful arts.

Copyright—through the lobbying of companies and special interest groups—operates now as a profit incentive to businesses looking to buy creative works and police any use or reference of their purchased art. These companies support a permission culture in copyright where artists should have to gain their approval before accessing a work, regardless of their intended purpose.

Throughout this Article, the effect of corporate copyright control on free speech and the public domain is heavily dissected. By analyzing the dissenting opinions of

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Eldred v. Ashcroft, this Article argues copyright was intended to promote the progress of arts, not stifle creativity to provide a monetary reward. Then, the proposed solution to corporate copyright control calls for lobbying action by creators so that the termination interest can be exercised sooner. Additionally, copyright term lengths should automatically change upon the transfer of ownership from the author to anyone other than his or her heirs. As a result of the proposed solutions, companies will be deterred from purchasing and policing the use of popular works, which will lapse into the public domain sooner. Therefore, copyright will serve to incentivize the person who created the work, rather than as a profit point for companies.

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INTRODUCTION

If you have ever celebrated your birthday at a restaurant, then someone among your family or friends has probably asked the wait staff to sing to you, ensuring that you did not make it through the meal without being embarrassed by a ridiculous hat and a free dessert. Invariably, you heard the wait staff singing loudly and obnoxiously as they headed your direction and the whole restaurant turned to look, but what you probably did not hear is the wait staff singing the classic standard “Happy Birthday to You” (*Happy Birthday*). This is because, up until 2015, the notable lyrics were considered to still be under copyright protection.¹

For decades, Warner/Chappell Music, Inc. (Warner/Chappell) claimed to own the copyright for the lyrics to *Happy Birthday*, heavily policing users of the song through fines and licensing agreements to a point where the

¹ *Marya v. Warner/Chappell Music, Inc.*, No. CV 13–4460–GHK (MRWx), 2015 WL 5568497, at *1, *19–20 (C.D. Cal. Sept. 22, 2015).

company allegedly earned up to \$2 million a year in profits.² How did Warner have the right to keep people from singing a song most consider an American folk classic? Did the company even have any part in the creation of this time-honored tune?

This narrative is one that happens all too often in the copyright world: large media conglomerates control the public's use and enjoyment of copyrighted works, and "Progress" of the "useful Arts" is stunted tremendously.³ Through an active lobby to Congress, many companies and special interest groups have created a culture that requires artists to ask copyright owners for permission to use their work to avoid infringement.⁴ This culture encourages "corporate copyright control," or in other words, the policing of large libraries and catalogs of historic songs, books, movies, television shows, and other works, ensuring that companies with copyright ownership in these works make as much money as possible, rather than allowing new artists and creators to build upon them.⁵ For artists and creators, this means that sometimes copyright gives no incentive to create, but instead stifles or even silences their progress.⁶

² Christine Mai-Duc, *All The 'Happy Birthday' Song Copyright Claims Are Invalid, Federal Judge Rules*, LA TIMES (Sept. 22, 2015), <http://www.latimes.com/local/lanow/la-me-ln-happy-birthday-song-lawsuit-decision-20150922-story.html> ("At a March hearing in the [Marya] case, records show, a Warner/Chappell representative seated in the audience told the judge that the company collects as much as 'six figures' for certain single uses of the song. The song brings in about \$2 million a year in royalties for Warner, according to some estimates.")

³ U.S. CONST. art. I, § 8, cl. 8; *see infra* Part I.

⁴ *Eldred v. Ashcroft*, 537 U.S. 186, 249 (2003).

⁵ *See* NEIL NETANEL, COPYRIGHT'S PARADOX 110, (1st ed. 2008).

⁶ As we will see in subsequent Parts, artists of all types run into barriers pertaining to copyright protection of works they may be building off of or accidentally include in their work. While these artists do not intend to infringe on anyone's work, they must face many obstacles to see their

This Article will address how current copyright law disfavors artists and creators alike, because of corporate copyright control and its “permission culture.” Part I will focus on concrete examples of artists, creators, and the public domain colliding with the gatekeeper mentality of corporate copyright ownership. This section will show how, across all genres—books, television, and music—copyright is forcing artists to compromise their artistic integrity for the completion of a project. Part II will focus on the expansion of copyright and the groups who lobbied Congress. This part will explain that the latest expansion came about because of an unbalanced discussion of copyright in Congress. As a result, the copyright expansion facilitated the culture of permission and corporate control that we now have in copyright.

Part III addresses the chilling effect that copyright expansion and corporations have on the public domain and free speech. Part IV will propose solutions to the issue of corporate copyright control and who can make the changes needed to return copyright to its roots. These solutions focus on redefining the copyright transfer interest to terms that give artists more room to negotiate when selling ownership interest. Additionally, this part will propose an automatic term change when the artist no longer owns the interest, so that copyright can return to promoting art rather than hindering those who look to create it.

I. THE CHILLING EFFECT OF CORPORATE COPYRIGHT CONTROL

A. *Happy Birthday to Whoever Pays Up*

In 2015, a long-awaited ruling regarding the copyright status of the *Happy Birthday* lyrics finally

art to fruition while satisfying the copyright holder who is a corporation seeking a high licensing fee. *Infra* Part I, Sections C, D.

answered the question many have previously asked.⁷ How is the “world’s most popular song” not already a part of the public domain?⁸

This case centered on several parties—particularly filmmakers—who felt that they paid unnecessarily large licensing fees for the use of *Happy Birthday*, and that Warner/Chappell’s alleged copyright ownership in the song was invalid.⁹ While the end result of the case illustrates that copyright’s current schematics allow for erroneous claims of ownership over expressive works and years of litigation to anyone who can afford to challenge said ownership, it is important to examine the entire history of the song to understand why it uncovers such an important issue with copyright control.¹⁰

⁷ *Marya v. Warner/Chappell Music, Inc.*, No. CV 13–4460–GHK (MRWx), 2015 WL 5568497, at *1 (C.D. Cal. Sept. 22, 2015); Mai-Duc, *supra* note 2.

⁸ Robert Brauneis, *Copyright and the World’s Most Popular Song*, 56 J. COPYRIGHT SOC’Y U.S.A. 335, 356 (2008–2009) (“The Guinness Book of World Records has deemed “Happy Birthday to You” the most frequently sung song in English, ahead of “For He’s a Jolly Good Fellow” and “Auld Lang Syne.”) (citing THE GUINNESS BOOK OF WORLD RECORDS 1998, at 180 (1997)).

⁹ *Marya*, 2015 WL 5568497, at *1–2; *see also* Benjamin Weiser, *Birthday Song’s Copyright Leads to a Lawsuit for the Ages*, N.Y. TIMES (June 13, 2013), http://www.nytimes.com/2013/06/14/nyregion/lawsuit-aims-to-strip-happy-birthday-to-you-of-its-copyright.html?_r=0 (noting that filmmaker Jennifer Nelson was informed by Warner/Chappell that she would have to enter into a licensing agreement and pay \$1,500 to use the song for a documentary she was making about the song’s history).

¹⁰ *Marya*, 2015 WL 5568497, at *2. The plaintiffs pursued the case because they felt that Warner/Chappell was “wrongfully asserting copyright ownership” to the song and should “return the ‘millions of dollars of unlawful licensing fees’” they received as a result. *Id.* at *3. These two parties were engaged in litigation for over two years. *Id.* at *1.

Although the history of the song's creation is not completely clear, most believe that the song is derived from, or is based off of, a tune written by sisters Mildred and Patty Hill, titled "Good Morning to All" (*Good Morning*).¹¹ Patty and Mildred wrote this song, which has the same eight-note melody with a similar lyric pattern to *Happy Birthday*, to be used in Patty's kindergarten class as a simple tool for teaching children musical concepts.¹² The sisters eventually began developing more children's songs, and they published those works along with *Good Morning* in a collection called *Song Stories for the Kindergarten*¹³ through Clayton F. Summy, who owned a music business that eventually became Birchtree, Limited.¹⁴

In the early 1900s, the lyrics to *Happy Birthday* began appearing alongside *Good Morning*, and the song

¹¹ Brauneis, *supra* note 8, at 341–50. Some speculate that the tune was unoriginal, but Brauneis disputes these arguments with several evidentiary points concluding that the Hill sisters "managed to put together a melody that is significantly different from all known previous melodies, and that delivers some drama, but that is at the same time extremely simple," that he thinks was "worthy of the incentive of copyright protection." *Id.* at 354.

¹² *Id.* at 349 ("They entered into their songwriting project with great seriousness and zeal, and they had the advantage that, since Patty was the principal of a kindergarten, they could repeatedly try out drafts of a song on kindergarten students."). The purpose of writing *Happy Birthday* was always rooted in education for the Hill Sisters, never a monetary profit. *Id.*

¹³ *Id.* at 348 (citing MILDRED J. HILL & PATTY S. HILL, *SONG STORIES FOR THE KINDERGARTEN* (1894)).

¹⁴ *Id.* at 362–63. Summy incorporated his music business that printed and distributed the songbook, then sold the business to John F. Sengstack. *Id.* Sengstack passed the business onto his son who grew the business and renamed it Summy-Birchard Company. *Id.* After corporate restructuring, the company then became a division of Birchtree, Ltd. *Id.*

grew to become America's go-to birthday song.¹⁵ The first publication of the full *Happy Birthday* lyrics appeared in a book published in 1911, and despite mentioning that the song shared the same tune as *Good Morning*, the book did not credit anyone—which notably became an outright exclusion of the Hill sisters as authors during the recent litigation between the filmmakers and Warner/Chappell.¹⁶ In 1934, the younger sister of Patty and Mildred, Jessica Hill, brought a copyright infringement suit against producers of a play that performed the song on stage.¹⁷ The important fact from the case is that, in her deposition, Patty stated she and Mildred incorporated alternate lyrics to the tune including the lyrics for *Happy Birthday* when they would sing *Good Morning*.¹⁸ Thereafter, Summy's company registered copyrights to two works containing the *Happy Birthday* lyrics and continued to claim ownership to the words.¹⁹

One of these registered works became the basis for Warner/Chappell's argument that *Happy Birthday* was still under copyright, and that they owned the rights to license it

¹⁵ *Id.* at 356. Brauneis references research that shows that birthday parties were not common practice until the 1830s, so there may not have been a standard birthday song when the Hill Sisters began writing music. *Id.* at 355.

¹⁶ *Marya*, 2015 WL 5568497, at *2. This book along with several other children's books listed *Happy Birthday* and, interestingly, not a single one credited anyone with authorship to the lyrics. *Id.*

¹⁷ Brauneis, *supra* note 8, at 371, 374. Jessica was an heir of Mildred and gained copyright interest in the sisters' works after Mildred passed away. *Id.* Jessica testified to having memory of singing the melody to *Good Morning* with the lyrics to *Happy Birthday*. *Id.* at 375–76.

¹⁸ *Id.* at 375. Although, many people think the lawsuit resulted in the court awarding authorship to *Happy Birthday* to the Hill sisters, this is incorrect. *Id.* at 372.

¹⁹ *Id.* at 380.

and charge as much as they liked.²⁰ However, the district court judge ruled that, regardless of the agreements between Summy and the Hill Sisters, Summy never owned a copyright interest in the lyrics to *Happy Birthday*; therefore, Warner/Chappell lost the right to continue profiting from *Happy Birthday* license agreements.²¹ After years of speculation over its ownership history, the world's most popular song is assumed to finally belong to the public.²²

²⁰ *Marya*, 2015 WL 5568497, at *5 (“Defendants contend, in brief, that the Hill sisters authored the lyrics to *Happy Birthday* around the turn of the last century, held onto the common law rights for several decades, and then transferred them to Summy Co., which published and registered them for a federal copyright in 1935.”).

²¹ *Id.* at *20. The defendant media conglomerate asked the court to conclude that the Hill sisters turned their rights over to Summy Co., but the court disagreed. *Id.* The court concluded that the Hill sisters only gave the company “rights to the melody, and the rights to piano arrangements based on the melody, but never any rights to lyrics.” *Id.* Overall, the court reached the conclusion that, even if the Hill sisters held a common law right to the lyrics of *Happy Birthday*, they never gave those rights to Summy Co. *Id.*

²² It is important to note that the *Marya* ruling did not officially declare the song in the public domain; rather the court said that the copyright interest Warner/Chappell claimed was not supported by the evidence they produced. Someone else could assert claim in copyright to *Happy Birthday* if they produced evidence of a copyright still under protection:

On Sept. 22, U.S. District Judge George H. King made headlines everywhere with a ruling determining that Warner/Chappell Music never acquired a valid copyright to the lyrics of the English language's most popular song. The federal judge stopped short of declaring the song to be in the public domain, but the opinion was celebrated by many who believe the copyright term is too long, that a work that traces back to a 19th century schoolteacher named Patty Smith Hill and her sister Mildred Hill shouldn't be under protection.

Eriq Gardner, *Here's Warner/Chappell's Plan to Save the "Happy Birthday" Copyright*, THE HOLLYWOOD REPORTER, (Oct. 15, 2015), <http://www.hollywoodreporter.com/thr-esq/heres-warner-chappells-plan-save-832345> [<https://perma.cc/QZF4-C52U>].

How did Warner/Chappell end up being a party in the fight to begin with? In 1988, Warner/Chappell purchased the company Birchtree, Ltd. for a reported \$25 million—an offshoot of the former Summy Co.—gaining the full author’s term interest to a song so engrossed in pop culture, that when it was reported to be up for sale, most assumed it was already in the public domain.²³ Since then, Warner/Chappell has continued to pull a profit from and control any use of *Happy Birthday*, a song they had no actual part in helping the Hill sisters create.²⁴ Warner/Chappell has gone after restaurants, performers, television shows, and movies for unlicensed uses of *Happy Birthday*, which means new works by other creators are being silenced instead of encouraged due to this type of corporate copyright control.²⁵

This story may seem like an exception to the rule, but the dispute over *Happy Birthday* is anything but atypical. As Neil Netanel illustrates in his book *Copyright’s Paradox*, copyright has been labeled “the engine of free expression.”²⁶ However, that protection has varied so much from its original intent that it now “imposes an unacceptable burden”

²³ Brauneis, *supra* note 8, at 363 (citing Geraldine Fabrikant, *The Media Business: Sound of a \$25 Million Deal: “Happy Birthday” to Warner*, N.Y. TIMES, (Dec. 20, 1988)). Brauneis notes that the owner of Birchtree Ltd. stated that Warner/Chappell actually purchased the company for \$15 million, not \$25 million, but that *Happy Birthday* accounted for about one-third of that amount. *Id.* at n. 106.

²⁴ See Weiser, *supra* note 9.

²⁵ See Mai-Duc, *supra* note 2 (“Until now, Warner has asked for royalties from anyone who wanted to sing or play “Happy Birthday to You” — with the lyrics — as part of a profit-making enterprise. Royalties were most often collected from stage productions, television shows, movies or greeting cards. But even those who wanted to sing the song publicly as part of a business, say a restaurant owner giving out free birthday cake to patrons, technically had to pay to use the song, prompting creative renditions at chain eateries trying to avoid paying royalties.”).

²⁶ NETANEL, *supra* note 5.

on expression.²⁷ We now live in an era where seeking out permission to access an existing work is preferred to the notion that creative works belong to everyone.²⁸ The author of a creative work should be granted only a limited monopoly, with “incentive to create” serving as the only objective of copyright law. Corporate copyright control is not restricted to music, but has spilled over into books and films as well.²⁹

B. Google’s Library Project

In the publishing world, Google—a company so big most would expect it to be the bad guy in this story—has been battling disputes over a service it has been developing for more than a decade.³⁰ The service is a subset of Google Books and is called the Library Project.³¹ Ironically, Google is not the one looking to withhold works through copyright ownership. Instead, this project involves Google partnering with several major research libraries to digitally scan each

²⁷ *Id.* at 4–5. Netanel opens by discussing how copyright only survives the First Amendment because of the “traditional free speech safety valves—principally the fair use privilege, copyright’s limited duration, and the rule that copyright protection extends only to a literal form, not idea or fact.” However, the loosening of the reigns on these “safety valves” has resulted in a growth in copyright protection that is fueled by “relentless copyright industry lobbying.” *Id.* at 6–7.

²⁸ *Id.* at 7 (arguing that distributors have created a “clearance culture” that forces creators to get permission for copyright licenses even for works that are likely to not infringe).

²⁹ *Id.* at 6 (“Yet copyright too often stifles criticism, encumbers individual self-expression, and ossifies highly skewed distributions of expressive power. Copyright’s speech burden cut a wide swath, chilling core political speech such as news reporting and political commentary, as well as church dissent, historical scholarship, cultural critique, artistic expression, and quotidian entertainment.”).

³⁰ *See* Authors Guild v. Google, Inc., 804 F.3d 202, 206–07 (2d Cir. 2015), *petition for cert. filed* Dec. 31, 2015.

³¹ *Id.*

book in their collections, with the aim of creating an enhanced card catalog of the world’s books.³² Google maintains in its collection both works in the public domain and those still under copyright, which has spurred multiple publishers to initiate a lawsuit.³³

Since 2005, Google has faced claims of copyright infringement from both the Authors Guild and the Association of American Publishers (AAP), which have resulted in years of litigation and settlement agreements, and continues to compromise the Library Project.³⁴ Google

³² *Google Books Library Project – An Enhanced Card Catalog of the World’s Books*, GOOGLE BOOKS, <https://www.google.com/googlebooks/library/> (last visited Apr. 2, 2016); *Library Partners*, GOOGLE BOOKS, <https://www.google.com/googlebooks/library/partners.html> (last visited Apr. 2, 2016). Google currently partners with over forty research libraries including the Austrian National Library, Harvard University, Columbia University, Ghent University Library, University of California, Oxford University, Princeton University and many more. *Id.* Since 2004, Google has indexed over 20 million books—most of which are out of print—into readable digital format. *Authors Guild*, 804 F.3d at 207.

³³ *Id.* at 208–09 (“Google notes that this identifying information instantaneously supplied would otherwise not be obtainable in lifetimes of searching.”).

³⁴ *See Authors Guild*, 804 F.3d at 211; *see also* Andrew Albanese, *Google, Publishers Settle Lawsuit Over Book Scanning*, PUBLISHERS WEEKLY (Oct. 4, 2012), <http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/54220-google-publishers-settle-lawsuit-over-book-scanning.html> [<https://perma.cc/DWB5-YE8M>] (This article focuses on the concessions of both Google and Association of American Publishers (“AAP”) who settled an agreement to have the publishers scanned works included in Google’s database. As the article explains, AAP along with the Authors Guild forced Google through years of litigation only to reach an outcome that was not very far from where they started. The AAP “retreat[ed] from their initial claims” because, practically speaking, “much has changed in the e-book market “since the beginning of the Library Project. Most predictions from the

allows users to search certain terms, and if the terms appear in copyrighted works, Google displays a limited view of text that includes the searched terms.³⁵ The opposing parties felt Google’s cataloging of their works was a clear copyright violation, and that Google’s actions would allow it to profit illegally, and hurt the copyrighted works’ overall commercial value. Google defended the Library Project using the fair use doctrine, and the court ruled in Google’s favor.³⁶ Most importantly, the court noted that any copyright infringement concerns were secondary at best to the greater societal benefit the Library Project offered.³⁷

Although Google itself is a large corporation and may be considered an overpowering figure in many instances, the Library Project is not one of them. Instead, the project is an example of what happens when attempts are made to create easier access to copyrighted works and to further the intent of the Copyright clause—corporate copyright holders initiate overwhelming opposition.³⁸ The Library Program has allowed millions to access public works and it also provides direction to protected works—ultimately driving more traffic in the direction of those benefitting in a

publishing community did not pan out and instead more books are in circulation and accessible.).

³⁵ *Authors Guild*, 804 F.3d at 209–10 (“In addition to telling the number of times the word or term selected by the searcher appears in the book, the search function will display a maximum of three ‘snippets’ containing it. A snippet is a horizontal segment comprising ordinarily an eighth of a page.”).

³⁶ *Id.* at 212, 229–30 (“[W]hile authors are undoubtedly important intended beneficiaries of copyright, the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship.”).

³⁷ *Id.*

³⁸ U.S. CONST, art. I, § 8, cl. 8; *see also* Albanese, *supra* note 34 (“Indeed, the deal comes after nearly seven years of litigation, including three years of stumping for a controversial settlement, which was rejected.”).

monopoly over the creation.³⁹ However, the project’s years of litigation and settlement agreements forced Google to prolong and change what it was offering, and the lawsuit stalled potential works from joining the catalogue for over a decade.⁴⁰

Google’s court proceedings along with the *Happy Birthday* dispute are the result of powerful control groups, consisting of or supported by corporations, who benefit from a monopoly over works they oftentimes did not create. When these copyright interests come under scrutiny, corporations can afford to tie up the court system and dispute the validity of any infringement claims for multiple years, all while continuing to profit and control the work.

C. *The Expense of 4.5 Seconds of The Simpsons*

As Jon Else experienced in making his documentary about stagehands, films are just as affected by overpowering corporate copyright ownership.⁴¹ Else had to produce a documentary that may “contain[] a bit of calculated untruth” because he was forced to edit out a television in the background of a shot that showed a scene from the *The Simpsons*.⁴²

³⁹ *Authors Guild*, 804 F.3d at 224 (“Snippet view, at best and after a large commitment of manpower, produces discontinuous, tiny fragments, amounting in the aggregate to no more than 16% of a book. This does not threaten the rights holder with any significant harm to the value of their copyrights or diminish their harvest of copyright revenue.”).

⁴⁰ Albanese, *supra* note 34 (Google created the “opt-out” policy where publishers could ask to have their copyrighted works removed from the library.).

⁴¹ NETANEL, *supra* note 5, at 17 (“Documentary filmmakers regularly edit out background footage and music to avoid the increasing costs, delays, difficulties, and barriers of obtaining copyright clearances.”).

⁴² *Id.* at 16–17.

The film displayed the show's main character Homer Simpson for 4.5 seconds, it was out of focus, and it contained no sound from the show.⁴³ This documentary was set to air on the Public Broadcasting Service, and after nine years of compiling funds and footage, Else was faced with a \$10,000 fee imposed by Twentieth Century Fox Film Corporation, the show's copyright holder.⁴⁴ Even though the creator of the show told Else that the shot posed "no problem at all," corporate copyright control had a chilling effect over Else's film.⁴⁵ Because the film studio acted as a gatekeeper, Else had to either cut the shot or digitally edit the scene—he chose the latter even though it brought the risk of exposing his documentary to criticism about its authenticity.⁴⁶

Corporate copyright control cost Else not only the integrity of his film, but it also forced him to incur expensive legal fees and waste time, as he had to hire a lawyer and look for any solution that did not involve editing out the footage of *The Simpsons*.⁴⁷ In an industry that already struggles to see a profit on the works created, Else could have faced a loss of investors or distributors, and potentially the shutdown

⁴³ *Id.* (describing that the shot showed the stagehands playing checkers in their downtime, which Else used to portray the opera production process from the stagehands' perspective).

⁴⁴ *Id.* (noting that this amount was substantially higher than other licensing fees Else paid for other copyrights contained in the film).

⁴⁵ *Id.* (noting the chilling effect over Else's work meant he had to retain legal counsel to resolve the issue, and make the decision to use the clip with the risk of litigation). Although Else's counsel thought that he could potentially win under the fair use doctrine, the risk of litigation and unpredictable outcome were enough to silence the potential message the scene could have made to his film. *Id.*

⁴⁶ *Id.* (noting that documentaries have strong chances of containing scenes that "have often been stripped of clips, background shots, music, and archival footage that would have been greatly enhanced poignancy, artistic quality and historical elucidation").

⁴⁷ NETANEL, *supra* note 5, at 16–17.

of his entire project without a solution.⁴⁸ While the chilling effect of corporate copyright control did not end Else’s film completely, he was still forced to produce a work he considered to be, at the very least, compromised.

D. Parody Works and the Civil War of Free Speech

Alice Randall’s novel *The Wind Done Gone* was almost silenced by corporate copyright control despite being a parody work protected by the First Amendment, as it was based on Margaret Mitchell’s classic *Gone with the Wind*.⁴⁹ Randall wrote her novel from the point of view of a slave depicted in Mitchell’s book set during the Civil War.⁵⁰ Randall’s parody work utilized the First Amendment to spur a political discussion about the romanticism of slavery in the post-Civil War era.⁵¹ Randall eventually was allowed to spread her message, but not without a battle in court where a trial court issued a preliminary injunction that halted the novel’s publication.⁵²

The law on parodied works could have been drastically altered if litigation had continued and had Randall lost in court.⁵³ Strictly because Randall chose to make her

⁴⁸ *Id.* at 17 (“Moreover film-makers typically face broadcasters, distributors, and errors and omission insurance carriers who insist on such clearances even for uses of public domain material and for incorporation of copyrighted images and music that should fit comfortably within the realm of fair use.”).

⁴⁹ *Id.* at 3.

⁵⁰ *Id.*

⁵¹ *Id.* (explaining that Randall sought to “explode the racist stereotypes that she believes are perpetuated by Mitchell’s mythic tale”).

⁵² NETANEL, *supra* note 5, at 3.

⁵³ *Id.* The 11th circuit opined that withholding Randall’s speech because of “the form of expression she chose” was clearly “at odds with the shared principals of the First Amendment and copyright law.” *Id.* Although, “not all courts have proven as solicitous of First Amendment

point under the First Amendment by building off the works of another, rather than penning an opinion piece or making a speech, gatekeepers empowered under copyright law attempted to quiet the expression of her art.⁵⁴

Across all genres and within multiple interests groups, the brunt of corporate copyright control is felt, and the end result is a chilling effect. Corporate copyright control results from an unbalanced view of property rights that is focused more on monetary progress than artistic stimulus. Corporate interest groups achieved the right to police copyrighted works, because they gained clout with lawmakers who tailored copyright to reflect their needs, rather than the Constitutional intent to promote the arts. Examining copyright's latest term extension aids in understanding how copyrighted works became a business rather than a motivation.

II. OVERGROWN COPYRIGHT TERMS

A. *Who led the crusade?*

Throughout history, Congress has continually grown and expanded the protections and term of copyright by gradual steps.⁵⁵ However, the update in 1976 substantially

values as the 11th circuit panel that lifted the ban on her novel." *Id.* at 4 (quoting *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1369 (N.D. Ga. 2001), *rev'd*, 252 F.3d 1165 (11th Cir. 2001)).

⁵⁴ *Id.* at 3 ("Perhaps Randall could have vented her rage in an op-ed piece, street corner protest, or scholarly article instead. But what more poignant way to drive her point home than to write a sequel that turns Mitchell's iconic story on its head?").

⁵⁵ *Eldred v. Ashcroft*, 537 U.S. 186, 194 (2003). The first copyright statute of 1790 allowed for a 14-year term with an additional renewable term for another 14 years. *Id.* The second expansion in 1831 allowed for 28 years of protection with a renewable term for 14 years after. *Id.* The third expansion in 1909 allowed for 56 years of protection which

changed the system from a set number of years to a time that spans well after a creator’s death—life of the author plus fifty years.⁵⁶ This expansion also included giving works made for hire protection for “75 years from publication or 100 years from creation, whichever expired first.”⁵⁷

In 1998, Congress took steps to change copyright more and extended the term even further—life of the author plus seventy years.⁵⁸ Works made for hire were given protection for 95 years from the publication date or 120 years from creation, determined again by whichever expires first.⁵⁹ Most notably, Congress categorized works by the reason for their creation to determine the term they should be allowed.⁶⁰ However, companies have found a way to circumvent this term distinction by purchasing works from authors and artists, gaining the full protection of a term intended to motivate an individual, rather than a company employee.⁶¹

Much of the opposition to the 1998 expansion is due to the fact that Congress allowed the new term to apply to works already in the public domain, and the new term

was 28 years with an opportunity to renew for another 28 years which applied to both new and existing works. *Id.*

⁵⁶ *Id.* at 194–95 (explaining that the shift in the term was powered by pressures to align the US copyright standards with European standards).

⁵⁷ *Id.*

⁵⁸ *Id.* at 195–96 (“This standard harmonizes the baseline United States copyright term with the term adopted by the European Union in 1993.”).

⁵⁹ *Id.*

⁶⁰ *Id.* at 194. Authors acting on their own inspiration have been afforded a different protection term than those works created by an employee acting only on the direction of a business or company. *Id.* at 195–96.

⁶¹ See *supra* Section I.A. As illustrated by the sale of *Happy Birthday*, Warner/Chappell made a business acquisition to purchase the company owning copyright interest in the song. Therefore, a company is profiting from a copyright term length intended to incentivize artists, rather than a work made for hire term allowed for business. *Id.*

seemed perpetual.⁶² These expansions were fueled by “a persistent army of special interest lobbyists, usually representing media companies, rather than the interests of creators and the general public.”⁶³ Those parties pushed for a new copyright term motivated by their interests only, and they continue to lobby before Congress every time one of their most profitable works is about to enter the public domain.⁶⁴

In 1998, special interest groups like the Recording Industry Association of America (RIAA) and the Motion Picture Academy of America (MPAA) testified before Congress arguing that longer terms were “very much in America’s economic interests.”⁶⁵ It is easy to use the broad, all-encompassing “America” to persuade that everyone—from creators to corporations—would benefit economically from a term expansion, but these groups did not actually

⁶² Derek Khanna, *Guarding Against Abuse: The Costs of Excessively Long Copyright Terms*, 23 COMMLAW CONSPECTUS 52, 65 (2014–15) (“The recapture of works that would be in the public domain represents one of the biggest thefts of ‘property’ in history, and has had significant economic impacts upon our culture, personal liberty and economy. The effects of this grand larceny impact learning, creation and innovation.”); *see also* *Eldred v. Ashcroft*, 537 U.S. 186, 199 (2003) (“Petitioners’ argument essentially reads into the text of the Copyright Clause the command that a time prescription, once set, becomes forever ‘fixed’ or ‘inalterable.’”).

⁶³ Khanna, *supra* note 63, at 61 (citing William Patry, *How to Fix Copyright*).

⁶⁴ *Id.* at 66. In a chart depicting the expansion of copyright, Khanna illustrates that Congress has expanded copyright just before Disney’s iconic Mickey Mouse character is approaching the public domain. *Id.* (citing Tom W. Bell, *Copyright Duration and the Mickey Mouse Curve*, AGORAPHELIA (Aug. 5, 2009)).

⁶⁵ Khanna, *supra* note 63, at 67 (quoting the head of the MPAA’s testimony during the legislature’s follow-up to the passage of the 1998 extension).

present evidence showing such.⁶⁶ Furthermore, the founders ordained copyright protection in order to “promote the Progress of Sciences and useful Arts,” never mentioning the idea that copyright should be a profit incentive for a particular interest group.⁶⁷ Many of these special interest groups grasp at extremes to make their arguments, and rarely do their predictions pan out.⁶⁸ This is why “[p]olicymakers should be highly skeptical” of the same organizations in the industry lobbying for particular interests, as past predictions were heavily blown out of proportion.⁶⁹

The 1998 extension, titled the Sonny Bono Copyright Term Extension Act, is known in jest as the Mickey Mouse Protection Act.⁷⁰ This is because Disney Corporation played a large part in pushing for a longer term,

⁶⁶ *Id.*

⁶⁷ *Id.* (quoting U.S. CONST, art. I, § 8, cl. 8). Khanna emphasizes that arguing something is best for “America’s economic interests” is a very vague concept that is not portrayed in the Constitution. *Id.*

⁶⁸ *See generally* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984). Copyright holders in the television industry argued that the manufacturer of video cassette recorders (VCRs) was liable for copyright infringement when people used VCRs to record television broadcasts. *Id.*; *see also* Khanna, *supra* note 62, at 69 (citing Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary H.R., 97th Cong. 2 (1982) (Statement of Jack Valenti, President, Motion Picture Association of America, Inc.). The MPAA testified before Congress that the VCR would be an “unleashed animal” that would make the film and television industry “bleed and hemorrhage” unless Congress acted. *Id.* Khanna points out that this theory was completely wrong because reported revenues showed that the film industry made substantially more money after VCRs were introduced. *Id.*

⁶⁹ Khanna, *supra* note 63, at 70.

⁷⁰ *Id.* at 67.

as Mickey Mouse was set to enter the public domain soon.⁷¹ Ironically, most of the storylines in Disney works are based on works in the public domain.⁷² Walt Disney intentionally took advantage of the public domain by waiting to release the feature film *Alice in Wonderland* until the book lapsed out of copyright protection.⁷³ Even Mickey Mouse, a parody character, was able to come into fruition because of the copyright policy of fair use—something that Disney fought heavily against years later when the character was depicted lewdly by cartoonists.⁷⁴ The irony of Disney’s lobbying for more copyright protection is that the latest extension guarantees that “there will never be another Disney.”⁷⁵

⁷¹*Id.* at 66 (“In fact, lobbyists have usurped the policy-making process itself to ensure that whenever [Mickey Mouse’s] term of copyright is set to expire, the law is extended again to make terms even longer.”).

⁷²*Id.* at 94–95. As shown in Table 1: Major Disney Films Based on Public Domain Works, *Snow White and the Seven Dwarves* is sourced to a Brothers Grimm folk tale. *Frozen* is a spin on Hans Christian Anderson’s “Ice Queen.” The animated feature *Fantasia*, popular in the 1940s and later reproduced after colorization, features the music of Bach and other famous classical composers. All of these films, including many more, have brought millions of dollars in profit to Disney, and much of their credit comes from the public domain. *Id.*

⁷³*Id.* at 95.

⁷⁴*Id.* at 96 (citing Lawrence Lessig, *FREE CULTURE – THE NATURE AND FUTURE OF CREATIVITY*, 135 (Penguin Books 2004)). The first film to feature Mickey Mouse, “Steamboat Willie” was a parody of “Steamboat Bill Jr”; see generally *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978). Disney sued Air Pirates for copyright infringement. The Air Pirates were a group of cartoonists using Mickey Mouse in their comic books to protest the messages Disney displayed in society and culture. *Id.*

⁷⁵ Khanna, *supra* note 63, at 96 (“While Disney took and reused from the public domain, none of the works created by Disney are in the public domain for others to build upon As Harvard Law Professor Lawrence Lessig has remarked, the Sonny Bono Copyright Extension Act ensures that ‘no one can do to Disney as Disney did to the Brothers Grimm.’”) (internal citation omitted).

By allowing corporations to control the conversation of copyright protection and extension in Congress, the culture surrounding creative works is one of “permission seeking,” with the copyright holder being a gatekeeper to dissemination of free speech and expressive arts.⁷⁶ Unfortunately, these are the main voices Congress listens to, and the current copyright system reflects values that only benefit the financial interests of those who lobbied.⁷⁷ Even though these lobbying groups convinced Congress to work in their favor, the copyright extension faced enough opposition to have the Supreme Court decide if the extension was constitutional.⁷⁸

B. Eldred v. Ashcroft and How the Dissent Got It Right

After the 1998 copyright extension went into effect, many individuals and businesses whose products and services were derived from works that were pulled out of the public domain petitioned the Court to respond to their concerns over Congress’s use of its power.⁷⁹ They argued that Congress exceeded the constitutional provision requiring that copyright protection last for a “limited Time” when it granted rights to authors for their lifetime plus

⁷⁶ *Id.* (“The content industry has essentially argued that copyright represents their natural right to property, a perspective vastly disconnected with the evidence from our founding era. Under the content industry’s logic, reusing others’ works without paying royalties or licensing is always stealing and they have pushed for more and more restrictions upon doctrines like fair use.”).

⁷⁷ *Id.* at 69 (“Their vested interest is obvious, they believe they can make more money from keeping the copyrights forever, but one special interest group’s vested financial incentive shouldn’t be the only one that Congress hears from or legislates on the basis of.”).

⁷⁸ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

⁷⁹ *Id.* at 192–93.

seventy years.⁸⁰ The Court rejected this argument with an analysis of Congress’s historical patterns of copyright extension, and it concluded that Congress did not exceed its delegated and enumerated power to grant copyrights for “limited Times.”⁸¹ While reasoning that Congress acted rationally, the Court noted that it was beyond its power to judge whether Congress acted wisely on a policy basis.⁸²

The Court’s decision received criticism, with *The New York Times* labeling it “A Corporate Victory, But One That Raises Public Consciousness.”⁸³ Those who disagreed with the case’s outcome emphasized that “the opinion was silent on whether the justices thought Congress had acted in the public’s best interest—and several of them suggested during the oral arguments that it had not.”⁸⁴ Others argued that “[g]iven the *Eldred* decision, there is nothing to stop a

⁸⁰ *Id.*

⁸¹ U.S. CONST. art. I, § 8, cl. 8; *Eldred*, 537 U.S. at 208 (“Accordingly, we cannot conclude that the CTEA—which continues the unbroken congressional practice of treating future and existing copyrights in parity for term extension purposes—is an impermissible exercise of Congress’ power under the Copyright Clause.”).

⁸² *Eldred*, 537 U.S. at 208 (“In sum, we find that the CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.”).

⁸³ Amy Harmon, *A Corporate Victory, But One That Raises Public Consciousness*, *THE SUPREME COURT: THE CONTEXT*, N.Y. TIMES (Jan. 16, 2003) (discussing how *Eldred v. Ashcroft* is “a major victory to the entertainment and publishing industries”).

⁸⁴ *Eldred*, 537 U.S. at 233 (Stevens, J. dissenting) (“A more complete and comprehensive look at the history of congressional action under the Copyright/Patent Clause demonstrates that history, in the case, does not provide the ‘volume of logic,’ necessary to sustain the Sonny Bono Act’s constitutionality.”). *See also* Khanna, *supra* note 62, at 66–67 (“During oral arguments of the 2002 case of *Eldred v. Ashcroft*, Justice Sandra Day O’Connor acknowledged that infinite copyright extension ‘flies directly in the face of what the framers had in mind, absolutely.’”).

future Congress from extending copyright’s term again and again.”⁸⁵

While the copyright extension was upheld, arguably the most scathing counterarguments to the extension came from Justices Stevens and Breyer, who both wrote dissenting opinions to address and foreshadow their issues with Congress’s actions.⁸⁶ Justice Stevens focused on the fact that copyright and patent protection are prescribed in the same clause of the constitution, yet the legal doctrine on both have split paths substantially.⁸⁷ He explained that in past revisions, Congress acknowledged that there are “significant limitations on their constitutional authority under the Copyright/Patent Clause to extend protection to a class of intellectual properties.”⁸⁸ However, he argued the majority reading of the same clause is “fundamentally at odds” with past congressional practices because they have allowed essentially no limitation to the power Congress has to regulate intellectual property.⁸⁹

Justice Stevens attacked the restoration of works already in the public domain because it “will not even arguably promote any new works by authors or inventors.”⁹⁰ He criticized the Court for giving so much deference to

⁸⁵ Robert S. Boynton, *The Tyranny of Copyright?*, N.Y. MAG (Jan. 25, 2004).

⁸⁶ *Eldred*, 537 U.S. at 222 (Stevens, J. dissenting); *Id.* at 242 (Breyer, J. dissenting).

⁸⁷ *Id.* at 222–23; *see also* Khanna, *supra* note 63, at 57. Congress has extended patent term lengths 43% over the years, but copyright has grown 580%. However, Congress has never explained “why a twenty-year term can provide sufficient incentive to inventors, but not to writers and artists.” *Id.*

⁸⁸ *Eldred*, 537 U.S. at 230.

⁸⁹ *Id.*

⁹⁰ *Id.* at 239 (“[N]o one seriously contends that the Copyright/Patent Clause would authorize the grant of monopoly privileges for works already in the public domain solely to encourage their restoration.”).

Congress's action under the Progress Clause, and argued that the Court gave Congress total authority to define the law in this area.⁹¹ The Court, in Justice Stevens's opinion, acted against the "basic tenets of our constitutional structure."⁹²

In a separate dissent, Justice Breyer wrote that this extension is virtually perpetual and "[i]ts primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors."⁹³ Justice Breyer argued that the Court should remember that the Copyright Clause is contained in the same document as the First Amendment, and the effects of exceeding the Copyright Clause could mean restrictions to speech.⁹⁴ Breyer opined that the Court should be more concerned about "a copyright statute [that] seriously, and unjustifiably, restricts the dissemination of speech" rather than relying on the Commerce Clause power the Court typically examines when Congress's actions are in question.⁹⁵ He reasoned that the Court must "recognize that this statute involves not pure economic regulation, but regulation of expression, and what may count as rational

⁹¹ *Id.* at 242 ("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.").

⁹² *Id.* ("It is emphatically the province and duty of the judicial department to say what the law is." (quoting *Marbury v. Madison*, 5 U.S. 137 (1803))).

⁹³ *Id.* at 242–43 (arguing that the effect of the extension "is not to promote, but to inhibit, the progress of 'Science'—by which word the Framers meant learning or knowledge").

⁹⁴ *Eldred*, 537 U.S. at 244 (opining that the Court should be more concerned about "a copyright statute [that] seriously, and unjustifiably, restricts the dissemination of speech" rather than relying on the Commerce Clause power the Court typically examines when Congress's actions are in question).

⁹⁵ *Id.* at 244.

where economic regulation is at issue is not necessarily rational where we focus on expression – in a Nation constitutionally dedicated to the free dissemination of speech, information, learning and culture.”⁹⁶

Justice Breyer concluded that the copyright extension was unconstitutional because it focused on private benefits more than public, which “will cause serious expression related harm ...[,] restrict traditional dissemination of copyright works ...[, and] inhibit new forms of dissemination through the use of new technology,” but, most importantly, the extension “threatens to interfere with the efforts to preserve our Nation’s historical and cultural heritage” affecting our ability to educate future generations.⁹⁷ Channeling James Madison and Thomas Jefferson, Breyer focused on the dangers of monopolies to emphasize that copyright “must serve public, not private, ends.”⁹⁸ Also important to Justice Breyer was the concern that this extension perpetuates the permission culture in copyright, which could limit access to older works.⁹⁹

Focusing on older works, Justice Breyer opined that these forms of expression may not retain much commercial value but could continue to serve an educational purpose.¹⁰⁰ However, with a copyright term that lasts so long, the decision to disseminate the work will not be up to the creator, but instead a distant heir or a corporation.¹⁰¹ Furthermore,

⁹⁶ *Id.*

⁹⁷ *Id.* at 266.

⁹⁸ *Id.* at 247–48

⁹⁹ *See id.* at 250 (“Indeed, in an age where computer-accessible databases promise to facilitate research and learning, the permissions requirement can stand as a significant obstacle to realization of that technological hope.”).

¹⁰⁰ *Id.* at 251.

¹⁰¹ *Id.* (noting the permission to use the work could be costly and would be a decision made by someone other than the creator).

Justice Breyer contended, Congress cannot justify the extension under the theory that it will pay off economically by incentivizing new creation, because “[n]o potential author can reasonably believe that he has more than a tiny chance of writing a classic that will survive commercially long enough for the copyright extension to matter.”¹⁰² Lastly, Justice Breyer denounced Congress’s motivation to compete internationally, stating “I can find nothing in the Copyright Clause that would authorize Congress to enhance the copyright grant’s monopoly power, likely leading to higher prices both at home and abroad, solely in order to produce higher foreign earnings” because, again, the point of the Progress Clause is not profit, but public access.¹⁰³ Justice Breyer concluded by saying “[i]t is easy to understand how the statute might benefit the private financial interests of corporations or heirs who own existing copyrights,” though he “cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public.”¹⁰⁴

The concerns and counterarguments of both Justices Stevens and Breyer expose and foreshadow many of the effects that corporate copyright control has over artists, writers, creators, and authors. Describing the “permission” culture, and the removed focus from progressing arts to profiting from them, these two Justices explain why the expansion of copyright has shifted away from the Constitutional meaning and no longer primarily benefits the

¹⁰² See *id.* at 255 (referencing a study that shows that only two percent of all copyrights retain commercial value after 55 to 75 years, and noting that even if the work falls in that two percent “the relevant royalties will not arrive until 75 years or more into the future, when, not the author, but distant heirs, or shareholders in successor corporation, will receive them.”)

¹⁰³ See *id.* at 261–63 (arguing Congress acted counter to the clauses intentions to benefit the public, and not the private, so the enhancement cannot be justified by “corporate profits alone.”)

¹⁰⁴ *Id.* at 266.

public.¹⁰⁵ The public domain and the First Amendment have suffered from this extension and the only way to correct these errors is for Congress to counteract the effects of the copyright extension.

III. THE COSTS OF CORPORATE COPYRIGHT OWNERSHIP

A. *The Shrinking Public Domain*

Arguably, one of the biggest losers to the copyright extension and the rise of corporate copyright control is the public domain. Because of the copyright extension, less works are now a part of the public domain and many of those removed works now come with large license fees for the right to use them.¹⁰⁶ Artists, creators, and authors are penalized for building off works they thought belonged to the public, and new artists now have a smaller pool to learn and expand on.¹⁰⁷ Although these works still are technically accessible through the copyright holders, many are held by corporations who purchased the copyright interest but continue enjoying a copyright term length intended to benefit an artist.¹⁰⁸ Consequently, creators such as writers

¹⁰⁵ *Id.* at 266 (“It is easy to understand how the statute might benefit the private financial interests of Corporations or heirs who own existing copyrights. But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public.”)

¹⁰⁶ *See* Khanna, *supra* note 63, at 70–71.

¹⁰⁷ *See id.* (noting Nobel laureate economists argued in *Eldred v. Ashcroft* that the longer term would harm consumers by denying access to many works that otherwise would be in the public domain).

¹⁰⁸ *See id.* at 70–71 (noting a brief submitted in *Eldred v. Ashcroft* argued that “the 1998 extension is inefficient and ‘reduces consumer welfare’ as consumers are denied the ability to acquire derivative works and content that otherwise would be in the public domain.”) (citing Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners,

and musicians have less room to operate under a substantially smaller public domain, and “we have clear evidence that, rather than serving as an incentive to create, excessively long copyright—well beyond what the Founders would support—actually hinders creation.”¹⁰⁹

As argued in *Eldred v. Ashcroft*, the removal of works from the public domain in no way promotes or gives incentive to create, outright failing the purpose of the Progress Clause.¹¹⁰ The fact that copyright exists at all is a sign that creation and speech will be restricted to some degree, but only to guarantee a greater payoff for society when that work that was under copyright becomes owned by the public and accessible to new artists, performers, or authors. However, the current term for copyright control undercuts the purpose of the limited monopoly, allowing money to be the focus of the protection rather than artistic enticement.¹¹¹

Corporate copyright ownership creates an unjustifiable chilling effect to the public domain as shown by the *Happy Birthday* case, where a gatekeeping corporation sought to silence the production of a film about

Eldred v. Ashcroft, 537 U.S. 186, 194 (2003) (No. 01-618) WL 1041846, at *3).

¹⁰⁹ *Id.* (arguing “extremely long copyright terms and unclear fair use laws ... [mean new] artists, directors and writers are unable to create derivative works without paying fees that can be so high as to make the cost of derivative works prohibitive or even impossible.”).

¹¹⁰ *Eldred*, 537 U.S. at 257 (Breyer, J., dissenting) (“And, of course, in respect to works already created—the source of many of the harms previously described—the statute creates no economic incentive at all.”).

¹¹¹ See Khanna, *supra* note 63, at 73–74 (“By conception, copyright’s restriction on personal liberty may sometimes be justified and necessary to enforce the statutorily created property rights ability to monetize properly ... but in the extreme these same policies often have effects that are much more pernicious and difficult to justify.”).

the song by using its copyright interest to restrict access.¹¹² As a result, the filmmakers spent years in court and the film was not finished as quickly as it could have been if the song had been in the public domain sooner. By removing works from the public domain, Congress and corporations do not feel the effect, but instead “[t]his is a cost that our society bears, not being able to hear the song that individuals prefer to hear.”¹¹³

When the public domain is accessible, education and learning thrive. Many looking to educate and inform about the Civil Rights movement have struggled with the notion that Dr. Martin Luther King Jr.’s *I Have a Dream Speech* is not a part of the public domain because the expressive work was afforded a longer copyright protection under the latest copyright extension.¹¹⁴ King’s purpose in writing the speech was not for a financial benefit and he would have written it with or without copyright protection because he hoped for his words to convey a message others could expand upon and learn from.¹¹⁵ King’s speech is well-known for deriving much of its themes and motifs from other works such as the *Bible*, the *Gettysburg Address*, *My Country Tis of Thee*, and the works of Shakespeare.¹¹⁶ King’s iconic speech may have been exponentially different if these works had been ripped from the public domain, given a longer copyright term, and

¹¹² *Marya v. Warner/Chappell Music, Inc.*, CASE NO. CV 13-4460-GHK (MRWx) 2015 U.S. Dist. LEXIS 129575, at *10 (C.D. Cal. Sep. 22, 2015)

¹¹³ Khanna, *supra* note 63, at 74.

¹¹⁴ *See id.* at 75–76 (noting that if copyright terms were shorter than fifty years, King’s speech would be in the public domain).

¹¹⁵ *Id.* at 76 (“He wanted to be quoted and to inspire future generations – and he clearly succeeded.”).

¹¹⁶ *Id.* (citing Vera Chin & Max Zimbert, *The Inspirations Behind “I Have a Dream,”* YAHOO! NEWS (Aug. 28, 2013, 5:29 AM), <http://news.yahoo.com/the-inspirations-behind--i-have-a-dream--223903740.html>).

controlled by a corporation demanding a high fee for any use of the works.¹¹⁷

Unfortunately, King's very work—a speech intended to engage others in political discourse—is now restricted from the public domain.¹¹⁸ This is a cost to education that is directly traceable to the copyright extension. King's estate, benefitting from a longer term, shares the intellectual property interest exclusively with licensor Intellectual Properties Management (IPM),¹¹⁹ and despite King's family saying previously that they want educators to be able to access his works, the Estate has repeatedly taken various news organizations to court over copyright violation claims.¹²⁰ Because of the copyright expansion and corporate copyright control, King's iconic speech now costs \$20 for anyone hoping to legally access footage of him delivering the speech. While many point out that this footage is readily available on YouTube, that is not a solution to news organizations, political groups, and potentially even educators who hope to use video footage of King delivering the speech in Washington. This solution, though simple, does not fix the fact that corporate copyright holders are allowed to act as gatekeepers to anyone attempting to build off the speech, despite the speech being derivative in itself of expressive works. If the current policy for copyright had been in place over any of the works King pulled from to create the speech, copyright could have been a stumbling

¹¹⁷ *Id.*

¹¹⁸ Valerie Strauss, 'I Have a Dream' speech still private property, THE WASHINGTON POST (Aug. 27, 2013), <https://www.washingtonpost.com/news/answer-sheet/wp/2013/08/27/i-have-a-dream-speech-still-private-property/>.

¹¹⁹ *Archive Terms & Conditions*, THE KING CENTER, <http://www.thekingcenter.org/archive-terms-conditions> [<https://perma.cc/B4AY-YUMG>] (last visited Apr. 4, 2016).

¹²⁰ Strauss, *supra* note 118.

block for the writer of one of the most momentous events in modern history.

The chilling effect that the copyright extension and corporate ownership have over the public domain plays out in the developing “permission” culture we have today.¹²¹ Copyright’s current state forces creators to ask for permission to any work they may want to use in their creation for fear that it may not belong to the public at all, regardless of age.¹²² Many places that hold the physical copy of aging expressive arts with little commercial value charge a fee to access, print, or copy any part of them, which can become prohibitive to users.¹²³ This mentality stands as a gatekeeper to works that may be in the public domain or may potentially be orphan works and constrains the creator to search out the supposed owner of the copyright interest before progressing in a new project.¹²⁴ Anyone developing “useful Arts” may see copyright and corporate control not as a progressive push to their work, but rather as an impediment that requires authors developing works to consider potential litigation threats looming overhead.¹²⁵

¹²¹ See *Eldred v. Ashcroft*, 537 U.S. 186, 249 (2002) (Breyer, J., dissenting) (“A second, equally important, cause for concern arises out of the fact that copyright extension imposes a “permission” requirement – not only upon potential users of ‘classic’ works that still retain commercial value, but also upon potential users of *any other work* still in copyright.”).

¹²² See *supra* Part I.

¹²³ See *Eldred*, 537 U.S. at 250–51 (Breyer, J., dissenting) (“The permission requirement can inhibit their ability to accomplish that task. Indeed, in an age where computer-accessible databases promise to facilitate research and learning, the permissions requirement can stand as a significant obstacle to realization of that technological hope.”).

¹²⁴ See *Khanna*, *supra* note 63, at 77–78 (noting it may be difficult to determine the owner of a work and whether it is still covered by copyright).

¹²⁵ See, e.g., *NETANEL*, *supra* note 5, at 16 (noting a filmmaker had insufficient money to litigate, and had to pay a lawyer to tell him that,

B. *Restricting Free Speech*

Art is so essential to political discourse that copyright must be contained in order to keep from infringing on free speech.¹²⁶ However, corporate copyright control has eroded the First Amendment’s natural right protection more and more with each congressionally mandated expansion.¹²⁷ Copyright has always come with the risk of burdening speech, but now the monopoly is at a level of abridging free speech such that it is no longer an “engine of free expression.” Neil Netanel, in examining the burdens copyright places on speech, categorizes particular hindrances into three categories in his book *Copyright’s Paradox*.¹²⁸ The first is what he calls a “censorial” speech burden where artists struggle to get their message across because they have a hard time accessing other expressive works, or they engage in “self-censorship” to avoid the risk of being sued.¹²⁹ The second category is when speakers run into “prohibitive cost[s]” such as high license fees that act as a gatekeeper to expression.¹³⁰ His last category is the chilling effect that happens when a small group of powerful companies maintain control of “vast inventories of copyrighted works,” or in other words, corporate copyright control—the basis for this Article.¹³¹ Because corporations

with the end result being him still compromising the integrity of his work)..

¹²⁶ *Id.* at 33 (“commercial entertainment and popular culture play a primary role in collective self-governance: they profoundly color our attitudes, beliefs, and perceptions of the world around us.”).

¹²⁷ *Id.* at 111 (“Commercial media firms commonly block speech that they suspect could impair the market value of a work in their copyright portfolio.”).

¹²⁸ *Id.* at 109.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

are concerned more about profits, “their decisions regarding what expression to produce” are enticed by money rather than “the inherent desire to make a statement about the world.”¹³² In many cases, the possible restriction on speech would make the art “far less effective, far less believable, and of far less value to the intended audience without reproducing substantial portions of the author’s work.”¹³³

Although copyright affords the same protections to individuals as it does to corporations, individuals are much more likely to lose their First Amendment rights.¹³⁴ Because “copyrights in popular expression are generally controlled not by individual authors ... but by firms, including motion picture studios, record labels, print publishers, music publishers, and their affiliates,” individuals are less likely to be in a position where they can fight potential free speech violations.¹³⁵ Individuals typically give up, where a corporation can spend years in litigation if it means more profits from owning a copyright or from having the ability to trade copyright licenses with other companies when they need one owned by another.¹³⁶ Typically the corporations thrive on their own expansive catalogues and the ability “to

¹³² *Id.* at 110 (noting media conglomerates feel the burden of copyright through “market strategy and profitability”).

¹³³ *Id.* at 112 (stating this in discussion of Randall’s parody book, a perfect example of copyright’s ability to not just chill speech but potentially threaten and silence speech all together considering a district judge allowed a preliminary injunction which halted the book’s circulation).

¹³⁴ *See id.* at 119 (“The industries’ top-heavy configuration, coupled with their repeated use of copyright to foreclose competition, amplifies copyright’s censorial effect and raises entry barriers to prospective new speakers and distributors.”).

¹³⁵ *Id.* at 109–10.

¹³⁶ *Id.*

buy or cross-license rights and to litigate when threatened with a copyright infringement lawsuit.”¹³⁷

For these groups, copyright ownership is a business that does not shy away from the “ability to charge a ‘supracompetitive price,’” even at the expense of burdening speech.¹³⁸ Netanel explains that the market power created by copyright stops the works from being used all together.¹³⁹ Where at one price someone may have been able to purchase a copy or obtain a license, their speech may be extinguished by the market power’s ability to deprive a consumer with rising prices.¹⁴⁰ The high-rising cost of copyright does not incentivize the monopoly holders to create, but instead limits “dissemination and thus imposes a deadweight loss.”¹⁴¹ Netanel argues that copyright creates artificial scarcity.¹⁴² By analogizing to physical property rights, he shows that when someone wants to buy the right to use a tangible piece of property that the object could reach a point of scarcity as it is not infinite.¹⁴³ However, intellectual property rights—specifically copyright—are rooted in the world of intangibles.¹⁴⁴ So where tangible property market prices may be driven by a threat of scarcity, this should not be the case in copyright, although it is.¹⁴⁵ The only thing that

¹³⁷ *Id.*

¹³⁸ *Id.* at 123 (“Copyright might provide an incentive for the creation and dissemination of much original expression. But where copyright confers market power, it also brings about a scarcity that would not exist but for copyright law.”).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 124.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

creates scarcity over an expressive art is the privileged monopoly, because if the right were removed completely, no additional cost would exist but the work could be shared by millions.¹⁴⁶

In an effort to expose this, several universities developed a research project titled Lumen, formerly the Chilling Effect Clearinghouse, which collects cease and desist letters that corporations send out threatening litigation to individuals.¹⁴⁷ The independent, non-profit group seeks “to educate the public [and] to facilitate research about the different kinds of complaints and requests for removal—both legitimate and questionable ... to provide as much transparency as possible about the ‘ecology’ of such notices, in terms of who is sending them and why, and to what effect.”¹⁴⁸ The main researchers are members of the University of California, Berkley School of Law’s Takedown Project who publish regular reports of research they have collected pertaining to takedown notices in different areas of intellectual property.¹⁴⁹

Projects like these are evidence that people within the intellectual property community want to analyze how

¹⁴⁶ *Id.* at 122.

¹⁴⁷ *Blog: Chilling Effects Announces New Name, International Partnerships*, LUMEN, https://lumendatabase.org/blog_entries/763 [<https://perma.cc/LJ4R-APVP>] (last visited Mar. 8, 2016); *About Us*, LUMEN, <https://lumendatabase.org/pages/about> [<https://perma.cc/QM2G-Q7UL>] (last visited Mar. 8, 2016) (explaining the project grew out of collaboration between the Electronic Frontier Foundation and law clinics at “Harvard, Berkeley, Stanford, University of San Francisco, University of Maine, George Washington School of Law, and Santa Clara University School of Law).

¹⁴⁸ *About Us*, LUMEN, <https://lumendatabase.org/pages/about> (last visited Mar. 8, 2016).

¹⁴⁹ *Id.*; see also *About*, THE TAKEDOWN PROJECT, <http://takedownproject.org/about> [<https://perma.cc/5X4Z-22DB>] (last visited Mar. 8, 2016).

copyright holders are exercising their rights.¹⁵⁰ With this research available, the burden that copyright places on free speech and the public domain can be evaluated. This data could expose a new direction that copyright could move in to be reoriented towards progress of the arts, rather than profits of the media conglomerates.¹⁵¹

As Alice Randall experienced with the release of her parodied work, *The Wind Done Gone*, the First Amendment often falls second to commercial interests of copyrighted works.¹⁵² Justice Breyer specifically argued that Congress expanded copyright with the Commerce Clause in mind rather than the First Amendment, and that artists and creators are silenced when they intend to build off of or answer any existing copyrighted works.¹⁵³ Whether through cease and desist letters or restricting access to the work all together, the First Amendment is substantially infringed upon by corporate copyright holders acting as gatekeepers under the power of copyright protection.

¹⁵⁰ *About*, THE TAKEDOWN PROJECT, <http://takedownproject.org/about> (last visited Mar. 8, 2016) (“The project looks to create greater transparency on these issues, both as a matter of technology sector norms and law, and with respect to both takedown notices and takedown procedures.”).

¹⁵¹ *Id.* (“Greater transparency is needed in order to understand how this fundamental global regulatory system for online speech works and how it affects senders of notices, intermediary providers, and targets of notices.”).

¹⁵² *See supra* part I.D.

¹⁵³ *See Eldred v. Ashcroft*, 537 U.S. 186, 263 (2002) (Breyer, J., dissenting) (arguing that Congress operated too much under the Commerce Clause to undercut the Copyright Clause and First Amendment).

IV. THE SOLUTION TO CORPORATE COPYRIGHT CONTROL: TERM LIMITATIONS

Copyright is where it is because of those who influenced Congress to change it for their own benefit.¹⁵⁴ In order to combat those effects, a change must be made by Congress to provide copyright protection for more definite limited times and guarantee the monopoly only for the purpose of creating incentives for authors. Because of the balance of powers, the courts can weigh on the decisions of Congress. However, as we saw in *Eldred v. Ashcroft*, the Court will not disturb or “second-guess congressional determinations and policy judgments ... however debatable or arguably unwise they may be” where Congress did not exceed its power under the Copyright Clause.¹⁵⁵ Therefore, the most effective and direct route to changing copyright is through Congress.¹⁵⁶ Copyright got to its current state by particular interest groups and media conglomerates gaining control of the conversation and taking their wishes before Congress.¹⁵⁷ To counteract the action of those lobbyists, individual authors will have to recognize the need for a change and make it happen for them.

¹⁵⁴ *Supra* Parts II, III.

¹⁵⁵ *Eldred*, 537 U.S. at 208.

¹⁵⁶ *See* U.S. CONST. art. I, § 8, cl. 8 (defining that only Congress has the power to determine the appropriate measures for copyright, therefore, the most effective and direct route to changing copyright is through Congress).

¹⁵⁷ Khanna, *supra* note 63, at 65–66. Khanna notes that technically, corporate authors are given a term of 120 years after creation or 95 years from publication, but these terms “reflect only part of reality.” Khanna argues that because corporations control the policy making process, they can almost guarantee the terms will lengthen and change in their favor.

A. *How to “Promote Progress”*

First, individual authors will need to realize that 2% of creative works continue to be profitable fifty-five to seventy-five years after fixation, so the motivation for copyright protection should not be one that gives false hope to everyone in artistic endeavors that their art will continue to produce monetary rewards for decades on end. Then, the focus of copyright can be returned to benefitting the public, because authors will see that their works could be more effective and easily circulated if terms were much shorter.¹⁵⁸

Many argue that public domain works do not get accessed once the incentive to protect the work is taken away.¹⁵⁹ While some believe public domain works are underused, “a comparison of public domain works from the 1910s and early 1920s with their still copyrighted counterparts from the 1920s shows that far more public domain works than copyrighted works are actually distributed to the public.”¹⁶⁰ However, the book industry disproves this theory regularly, as publishing companies are constantly repackaging and adding commentary to classic works already in the public domain and which contribute to the competitive market.¹⁶¹

Authors will need to consider the future of their works to see that a longer copyright term does not mean it continues to serve as a monetary profit after their death, but

¹⁵⁸ Khanna, *supra* note 63, at 65.

¹⁵⁹ NETANEL, *supra* note 5, at 200–01.

¹⁶⁰ *Id.* (citing Mark A. Lemley, *Ex Ante versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 136–37 (2004)).

¹⁶¹ *Id.* at 201 (quoting Mark Lemley, Netanel points out that publishers print and distribute public domain books yearly saying “If people are willing to pay enough to justify printing copies of *Ulysses*, copies of *Ulysses* will be printed. And if people are not willing to pay even the marginal cost of printing, granting exclusive rights over *Ulysses* would not solve the problem.”).

instead it could mean that their work will be withheld from the public without their say.¹⁶² As seen with Google’s Library Project, many books that were just sitting on a shelf in a less accessible physical location are now readily available to new artists, educators, students, and anyone merely looking for a new book to read through the online service.¹⁶³ If this same type of service was developed for other forms of media, then filmmakers and musicians could see their work live on for future generations to learn and expand on.¹⁶⁴ Creators will need to prioritize the exposure of their works to subsequent cultures over the minute likelihood that they will see any financial profit from those people.

After reevaluating their desired purpose for copyright, individual authors will need to consider how most works are treated after the author dies or sells away ownership. This will help determine what the appropriate terms and conditions should be upon selling of rights or once the work no longer generates a profit. Artists should study research like The Takedown Project and Lumen to see how their work could potentially be policed after they lose creative control or pass away. It is hard to believe that the Hill sisters wanted their song restricted from being used in movies or music, and certainly not from children’s birthday parties, even if they were at a restaurant benefiting

¹⁶² *Id.* at 202 (“There is a wealth of evidence that subsisting copyrights in old works is more of a hindrance than a help in the digitization of our cultural heritage.”).

¹⁶³ *See supra* Part I.B.

¹⁶⁴ *See* NETANEL, *supra* note 5, at 202–03 (discussing the potential loss of works from cultural heritage, Netanel says, “[o]ur best hope for preserving and making those works available, it appears, is to remove them from copyright constraints and allow nonprofit, volunteer, and publicly funded libraries and archivists freely to exploit the efficiencies of digital technology.”).

commercially from the birthday.¹⁶⁵ These projects could help authors to see when corporate ownership means that the song they wrote for educational purposes or even entertainment value is now being withheld from the public's enjoyment.

B. Lobbying for the "Useful Arts"

1. Conditional Transfers

Creators could consider lobbying for a conditional transfer of copyright ownership that provides more control to the authors, writers, or artists than the existing transfer rights currently in place under the copyright laws. The current copyright statute contains provisions allowing an author to retain a termination interest when he or she transfers ownership of and publishing rights to the work.¹⁶⁶ However, an author who sells his or her copyright interest in a work may only exercise the termination within a five-year period that lapses after thirty-five years has accrued from the grant of ownership.¹⁶⁷ This statute allows designated heirs to the author the right to terminate the grant of ownership, but still no earlier than thirty-five years from the original transfer.¹⁶⁸

¹⁶⁵ See Brauneis, *supra* note 8, at 348 (quoting Patty Hill's testimony: "One was to provide good music for children. The second was to adapt the music to the little child's limited ability to sing music of a complicated order. Also, we wished the song to express the idea and the emotions embodied in the words.").

¹⁶⁶ 17 U.S.C. § 203 (2015).

¹⁶⁷ *Id.* (requiring the author to serve sufficient notice of the termination to the interested parties in writing within the designated time period before the termination is effective).

¹⁶⁸ *Id.* (limiting designated heirs to the author's widow or widower, surviving children and grandchildren, or if none of those people are living, the author's executor, administrator, personal representative, or trustee).

Congress acknowledged a need for authors to retain a transfer interest upon granting ownership rights because of “the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.”¹⁶⁹ However, the requirement that a transfer cannot be revoked until thirty-five years after grant of ownership is still a substantial amount of time that could be limited or reworked in a way that is justifiably more progressive to arts. Essentially, a business may buy an unknown song for minimal cost from a struggling musician without much room to negotiate, then after the work becomes valuable, that business rather than the musician will benefit from the song’s royalties and licenses leaving the musician to wait at least thirty-five years before he or she has any chance of redeeming ownership. Copyright should be redirected to ensure that the incentive it invokes applies to people actually creating works in that time, instead of leaving them regretful for a grant of ownership they made from a desperate position.

For a solution to this problem, authors may lobby to receive some sort of residual interest of their grant of ownership if the work continues to pull a certain percentage of profits after a decade or more. This will protect the cliché “starving artists” who sell away their rights to a work because they are in dire need of money, but see their creative expression turn a huge profit for an already wealthy corporation years later. This type of solution would provide that the Hill Sisters would continue to benefit and be motivated to create new works, even though they sold their ownership rights to *Happy Birthday* at a time when it may have seemed only momentarily profitable. Although there is no way to know how much Summy paid the Hill Sisters (if they paid them anything at all) for rights to publish the song, there is proof that Birchtree sold them for at least \$15

¹⁶⁹ H.R. REP. NO. 94-1476, at 124 (1976).

million, maybe even more, and one-third of that sale was attributable to profits from *Happy Birthday*.¹⁷⁰ If the Hill sisters were able to exercise a transfer interest sooner than thirty-five years after a grant of ownership, or were able to pull a residuary interest from a song they did not know would be profitable, then the incentive that copyright gave to *Happy Birthday* could be traced directly to the artist who created it, not solely to a corporation, which is a clear promotion of the progress of a useful art.

2. Automatic Shortening of Copyright Term upon Transfer of Ownership

Another solution that creators should consider lobbying for is an automatic change in the length of a copyright term once the right is transferred to anyone other than the author or his or her heirs. Congress placed the work made for hire doctrine in place so that corporate authors had a place in copyright, although Congress clearly intended for corporations to have a different term than individual authors.¹⁷¹

If Congress were to place a statutory limitation to copyright terms once the ownership interest is transferred out of the author's possession, then corporations could no longer work around the work made for hire doctrine and the chilling effect would likely shrink as there would be less motivation for corporations to buy works from artists and restrict dissemination. By limiting the term upon transfer, companies would automatically lose the desire to control a work of art for the full length afforded to artists, which would alleviate their ability to purchase up catalogs of historic works and withhold them from public access. Furthermore, this change would eliminate situations like *Happy Birthday* from tying up the court system for years on

¹⁷⁰ See *supra* note 23.

¹⁷¹ See 17 U.S.C. § 201(b) (2015); *supra* Part II.A.

end. With shorter term lengths after transfer, there would be no motivation to spend years in court litigating the legitimacy of a copyright interest if the term was much shorter than life plus seventy years.

Individual authors could return copyright to serving its constitutional purpose of promoting creativity if the opportunity to create such monopolies were off the table—ultimately making their works more accessible. As observed in *Eldred v. Ashcroft*, many believed the CTEA exceeded Congress’s power all together to grant copyrights for limited times because life plus seventy years seemed almost infinite.¹⁷² Additionally, the limitation of copyright terms ensures the public will actually benefit from the creation of a temporary monopoly if it lasts only for a reasonably measurable span of time.¹⁷³

In lobbying Congress, individual authors can motivate their representatives to focus more on the Copyright Clause of the Constitution and less on the Commerce Clause when determining the protection afforded in the progress of arts and sciences.¹⁷⁴ Extending the copyright term of already existing works does not incentivize creativity, and neither does allowing the full copyright term to transfer to someone who did not create the

¹⁷² *Eldred v. Ashcroft*, 537 U.S. 186, 247, 256 (2003) (Breyer, J. dissenting) (quoting from the House report during the 1909 expansion of copyright to show the former Congress understood that copyright was intended to benefit the public and if it was no longer advancing learning then it was “beyond the power of Congress”).

¹⁷³ *See id.* at 246 (referencing the opinions of both founders Madison and Jefferson that warned against the dangers of monopolies and contending that copyright monopolies must remain temporary for the public to benefit from them).

¹⁷⁴ *See Eldred*, 537 U.S. at 245, 266 (arguing “[t]he [Copyright] Clause exists not to ‘provide special private benefit’ but ‘to stimulate artistic creativity for the general public good.’”) *Id.* at 245 (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

work of art. Justice Breyer addressed this issue in his dissent when he argued that the “primary legal effect [of the copyright extension] is to grant the extended term not to authors, but to their heirs, estates, or corporate successors [and,] most importantly, its practical effect is not to promote, but to inhibit, the progress of ‘Science’—by which words the Framers meant learning or knowledge.”¹⁷⁵ He argued Congress missed the mark because copyright “must serve public, not private ends,” seeking to encourage creativity and education through incentivizing authors to produce.¹⁷⁶ Instead, the commercial interest in copyright inhibits derivative works and discourages free speech, so artists could explain to Congress that the potential profitability of a work under copyright protection is fleeting and not worth the chilling effect it places over the public domain and the First Amendment; therefore, copyright protections should not be centered around this point.

By limiting the term at transfer, Congress can return to protecting not only the interests of public progress through copyright, but also allow speech to flow freely through creativity. As seen in the case involving *Happy Birthday*, documentary filmmakers were restricted from using the song in a film about the song’s history unless they paid the publishing company to license it. Although we know how much Warner sought to make from the filmmakers’ usage of *Happy Birthday* (\$1,500-\$5,000), we have no idea how much it actually cost both parties to litigate the case, not to mention the burden it placed on the courts by being pending on the docket for three years.¹⁷⁷ Justice Breyer illustrated in his dissent that a “cause for concern arises out of the fact that copyright extension imposes a ‘permissions’ requirement . . . [and] the permission requirement can inhibit or prevent the

¹⁷⁵ *Id.* at 243.

¹⁷⁶ *Id.*

¹⁷⁷ *See* Mai-Duc, *supra* note 2.

use of old works (particularly those without commercial value): (1) because it may prove expensive to track down or to contract with the copyright holder, (2) because the holder may prove impossible to find, or (3) because the holder when found may deny permission either outright or through misinformed efforts to bargain.”¹⁷⁸ Justice Breyer also points to empirical evidence proving that the cost of asking permission “can be prohibitive.”¹⁷⁹ This is equally applicable to the concept of limiting rights after transfer. Companies who purchase ownership of works have the ability to restrict users including “not only movie buffs and aging jazz fans, but also historians, scholars, teachers, writers, artists, database operators, and researchers of all kinds—those who want to make the past accessible for their own use or for that of others.”¹⁸⁰

Works that become so engrained in pop culture and history are limited in usage by people who did not create them. The success of the populace-run government is that ability to speak freely within entertainment and pop culture.¹⁸¹ If we silence derivative or transformative works, then we potentially quiet arts that would have been made otherwise.¹⁸² We could be silencing small pieces that play into a larger message. If collective self-governance is a purpose of the First Amendment, then creative expression

¹⁷⁸ *Eldred*, 537 U.S. at 249 (Breyer, J., dissenting).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See NETANEL, *supra* note 5, at 33.

¹⁸² *Id.* at 115 (“Copyright’s speech-chilling effect arises from a complex interplay of bloated copyright holder entitlements, forbidding litigation costs, copyright holder overclaiming, media’s clearance culture, speech intermediaries’ overdeterrence, and widespread uncertainty about just how expansive are copyright holder rights at the intersection of fair use, the idea/expression dichotomy, de minimis uses, substantial similarity, and a host of other nebulous doctrines that may or may not circumscribe copyright in any given instance.”).

would be included in that.¹⁸³ Copyright may burden free speech, but it should not abridge it.

The permission requirement, which comes along with the full term, allows an unrelated purchasing party to restrict free speech usage and dissemination of the work, which could be conflicting with the original author's wishes.¹⁸⁴ Some users may give up completely on legally using copyrighted works because "the holder may prove impossible to find" as in the case where ownership interests are sold and resold as companies dissolve and reform.¹⁸⁵ If the term was limited after transfer of ownership, then works would move faster into the public domain and allow for optimal usage.

C. *Addressing the Opposition*

Counterarguments to limiting the term after transfer of ownership could be heavily rooted in capitalism interests and fair business standards. However, none of these arguments can overwhelm the fact that copyright is rooted in public use, not economic stimulation.¹⁸⁶ Some may look at it as unfair to businesses that they cannot purchase the full right to what essentially is a property interest, like they could with a tangible piece of property. This is where the tenets of

¹⁸³ See NETANEL, *supra* note 5, at 33 (explaining that even if the First Amendment was solely about collective self-governance, then free speech would include creative expression regardless of how directly it points to a political message, so copyright, which protects that creative expression, is included in and effects free speech.).

¹⁸⁴ See *supra* Part III.C.

¹⁸⁵ See *Eldred*, 537 U.S. at 250–51 (Breyer, J., dissenting) (pointing to empirical evidence that clearance processes and obtaining permission can halt college research projects and stop performances of youth or community orchestras, all of which qualify as examples of speech that could be forced to be withheld from the public due to the ownership interests of a non-creator).

¹⁸⁶ See *id.* at 245.

real and personal property differ from intellectual property. The Founders allowed protection of intellectual property for a limited time only to create incentive to produce more works,¹⁸⁷ but not with the intention of sole authorship and protection from the rest of the world, like real and personal property.

Furthermore, works copyrighted under the work made for hire doctrine have a shorter term than those fixed under sole authorship. The difference in the terms based on the owner shows that Congress is already attuned to setting different limits for copyrights once they no longer benefit the creator and cannot incentivize other creation.

Some may argue that whoever is purchasing a copyright for profit should benefit from the full term because they have to work to protect the usage of the work, which should be rewarded. However, the Court has continually rejected Congress’s “sweat-of-the-brow” reasoning for term length.¹⁸⁸ Just because someone has the financial stability to purchase a copyright and police the usage of it does not mean they should be rewarded for the same amount of time as the person who created it—especially when creators are only afforded that protection so they will create more.

CONCLUSION

With a refocused agenda, artists, writers, musicians, and creators can advocate for themselves before Congress to reverse the effects of corporate copyright control. Creators will need to identify how their priorities align with the historical intent of copyright and highlight concrete examples of society losing to businesses with control of copyright works to be persuasive in arguing for new

¹⁸⁷ See *id.* at 245–46.

¹⁸⁸ *Id.* at 235 (Stevens, J., dissenting) (citing *Wheaton v. Peters*, 33 U.S. 591, 661 (1834)).

legislation. Copyright can still be effective in promoting arts through incentives, but until Congress hears of the chilling effect and permission culture that copyright embodies, the public will have no choice but to endure corporate copyright control because they effectively used the democratic process to their advantage.

