

# WHO FRAMED MICKEY MOUSE?

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## INTRODUCTION

In the spring of 2022, spurred on by broader issues, Congressional Republicans made numerous threats, addressed at The Walt Disney Company, based on the belief that Disney had been the main advocate for – and beneficiary of – the 1998 law extending copyright by 20 years.<sup>1</sup> However, I will show that although Disney was more than a disinterested party to the extension of copyright term for corporate works to 95 years, they were neither the only party seriously pushing for such a measure nor were they especially significant – except to the law’s opponents.

This is significant, because the narrative displaces individual creators in place of making the 1998 Act as being about big business versus individuals. Indeed, opinions like the Breyer dissent in the Supreme Court’s opinion in *Eldred* frequently seems to assume this. Further, the debates over copyright term extension – and Disney’s association with the bill – are part of the development of the modern ideological dialogue about this most American of companies.

## I. THE CONVENTIONAL NARRATIVE

Storytelling is to the lawyer as surgery tools are to surgeons. “Law is full of stories, whether these are stories that are told in the courtroom as lawyers try to weave together compelling and competing versions of an event, in the legislative histories that subtend a body of statutes, or in stories about the origins and acceptance of legal systems.”<sup>2</sup> Giving a legislative act a name helps the nation remember its contents.<sup>3</sup> It is fair to conclude that with that name can be accompanied by a story because it may be an easier sell.<sup>4</sup>

One of those popular stories is how copyright protection was extended to life of the author plus fifty years, and then again changed to life of the author plus seventy years. “The Mickey Mouse Copyright Act, also known as the

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<sup>1</sup> <https://www.cbsnews.com/news/republicans-target-mickey-mouse-disney-copyrights-florida-dont-say-gay-law/>;  
<https://www.hawley.senate.gov/sites/default/files/2022-05/Copyright%20Clause%20Restoration%20Act.pdf>

<sup>2</sup> Allison Anna Tait & Luke Norris, Narrative and the Origins of Law, 5 Law and Human. 11 (2011).

<sup>3</sup> See Renata E.B. Strause, et al., How Federal Statutes Are Named, 105:1 Law Library J. 7, 9 (2013).

<sup>4</sup> *Id.* at 24.

1998 Sonny Bono Copyright Term Extension Act, extended the life of a registered copyright from fourteen years with an additional option for renewal of another fourteen years to life of the create plus seventy years.<sup>5</sup> This Act “retroactively extended copyright protection.”<sup>6</sup> First, Disney allegedly lobbied for an extension to the Act of 1909 which was granted through the Act of 1976, allowing copyright protection to last the life of the author plus fifty years. Then, Disney did it again.

The most common telling of the story is that Walt Disney lobbied hard for Congress to revisit term limits in 1998 due to prior renditions of Mickey Mouse imminent dive into the public domain.<sup>7</sup> Though some sources argue that these early depictions of Mickey Mouse did not have valid copyrights in the first place, today’s Disney asserts its copyrightability.<sup>8</sup> As part of this account the official rationale for term extension – that it was done to achieve parity with the European Community’s Directive on Duration from 1993 – was a fig leaf to disguise the bill’s true purpose.

Today, Disney is concerned that outside derivative works using the Mickey Mouse depicted in “Steamboat Willie” will be used in a way that will make consumers believe Disney supports them.<sup>9</sup> Justice Ginsburg was concerned that companies, including Disney, will begin to assert trademark rights to create further quasi-copyright protections to continue.<sup>10</sup> “A group of Republican lawmakers has vowed to oppose any effort to extend the protection — already extended twice since the original expiration date in 1984 — as a way to punish Disney, which some conservatives have cast as an outsize cultural force with a progressive agenda they have recently taken to describing as dangerous.”<sup>11</sup>

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<sup>5</sup> Disney’s Influence on U.S. Copyright Law, CARDOZO LAW: BLOG (Aug. 26, 2021), <https://online.yu.edu/cardozo/blog/disney-influence-copyright-law>.

<sup>6</sup> Timothy B. Lee, 15 Years Ago, Congress Kept Mickey Mouse Out of the Public Domain. Will They do it Again?, Washington Post (Oct. 25, 2013, 9:00 AM), <https://www.washingtonpost.com/news/the-switch/wp/2013/10/25/15-years-ago-congress-kept-mickey-mouse-out-of-the-public-domain-will-they-do-it-again/>.

<sup>7</sup> *Id.*

<sup>8</sup> See Douglas A. Hendenkamp, Free Mickey Mouse: Copyright Notice, Derivative Works, and the Copyright Act of 1909, 2 VA. Sports & ENT. L.J. 254 (2003). See generally Joseph Menn, Whose Mouse is it Anyway?, LA TIMES (Aug. 22, 2008, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2008-aug-22-fi-mickey22-story.html>.

<sup>9</sup> See generally Brooks Barnes, Mickey’s Copyright Adventure: Early Disney Creation Will Soon Be Public Property, N.Y. TIMES (Dec. 27, 2022, 3:16 PM), <https://www.nytimes.com/2022/12/27/business/mickey-mouse-disney-public-domain.html>.

<sup>10</sup> *Id.*

<sup>11</sup> Hugo Martin, Republicans Took Away Disney’s Special Status in Florida. Now They’re Gunning for Mickey Himself, L.A. TIMES (May 11, 2022), <https://www.latimes.com/business/story/2022-05-11/mickey-mouse-copyright-expiration-disney-under-attack-republicans>.

The law was renamed the Sonny Bono Copyright Term Extension Act at the time of its passage, to honor the recently deceased Congressman and performer who had fought for it.<sup>12</sup> Calling the Copyright Term Extension Act the “Mickey Mouse Protection Act” was of course to indicate that Disney was the prime mover behind the act.<sup>13</sup>

## II. PROLOGUE TO EXTENSION

Prior to 1998 there were three major extension of copyright term, not counting wartime extensions of time to file,<sup>14</sup> or work-specific extensions of term.<sup>15</sup> There was an extension from the original term of 14 years with an optional 14 year renewal in 1831 to a 28 year original term, while retaining the optional 14 year renewal, for a maximum possible term of 42 years. In 1909 the optional renewal term was extended to 28 years, for a maximum possible term of 56 years. And following a series of piecemeal extensions, the 1976 copyright act formalized the term of copyright at life of the author plus 50, or an extension of the maximum possible term for preexisting works (and published works for hire) to 75 years.<sup>16</sup>

### A. The 1831 Extension

In his biography of the lexicographer Noah Webster, Harry Warfel asserted that Webster “unquestionably is the father of copyright legislation in America.”<sup>17</sup> This was based partly on Webster’s own account of his copyright advocacy, published shortly before his death.<sup>18</sup> The narrative that Noah Webster is the father of American copyright law is quite widespread, being found on the official blog of the Copyright Clearance Center,<sup>19</sup> and official U.S. Copyright Office publications.<sup>20</sup> While popular, this story has been debunked – while Webster was indeed among those active in lobbying for copyright protection in the 1780s through 1790, others were as well, and he deserves neither sole nor primary credit for the passage of state laws during

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<sup>12</sup> Renata E.B. Strause, et al., How Federal Statutes Are Named, 105:1 Law Library J. 7, 9 (2013).

<sup>13</sup> Nick H Kamboj, Disney’s Influence on the Enactment of the Copyright Term Extension Act (“CTEA”), as Well as the CTEA’s Retrospective and Prospective Impact, Master’s Thesis, HARVARD EXTENSION SCHOOL (2018), <https://dash.harvard.edu/bitstream/handle/1/42004051/KAMBOJ-DOCUMENT-2018.pdf>.

<sup>14</sup> Act of September 25, 1941, Pub. L. No. 77-258, 77th Cong., 1st Sess., 55 Stat. 732.

<sup>15</sup> [https://www.copyright.gov/history/lore/pdfs/201102%20Lore\\_February2011.pdf](https://www.copyright.gov/history/lore/pdfs/201102%20Lore_February2011.pdf); United Christian Scientists, 829 F.2d 1152 (D.C. Cir. 1987).

<sup>16</sup> More details of copyright term under the 1976 Act follow *infra*.

<sup>17</sup> Harry Warfel, Noah Webster: School Master to America 58 (1936, reprinted 1966).

<sup>18</sup> Noah Webster, On the Origins of the Copy-Right Law of the United States, in A Collection of Papers on Political, Literary, and Moral Subjects (1843).

<sup>19</sup> Dave Davis, Noah Webster, America’s First Copyright Lobbyist, Velocity of Content Blog, Copyright Clearance Center (Feb. 7, 2020), at <https://www.copyright.com/blog/noah-webster-americas-first-copyright-lobbyist/>.

<sup>20</sup> [https://www.copyright.gov/history/201206\\_Lore\\_Noah%20Webster.pdf](https://www.copyright.gov/history/201206_Lore_Noah%20Webster.pdf)

the 1780s, nor the Constitutional provision giving Congress the power to legislate regarding copyrights, nor the first federal copyright act in 1790.<sup>21</sup> However, while Webster may not have been the driving force behind those measures, it does seem he was the dominant force behind the first copyright term extension, in 1831.<sup>22</sup>

Noah Webster published the initial edition of his spelling book in 1783, and a substantially revised version was published in 1787.<sup>23</sup> In 1804, with the copyright in earlier editions expiring, Webster prepared a “Revised Impression,” which was newly registered for copyright protection, even though this edition “produced no dramatic changes.”<sup>24</sup> With a renewal duly filed in 1818, copyright in the work which Webster and his family relied on for income was due to expire in 1832.<sup>25</sup> In 1828 Webster finally completed his decades-long project and published his magnum opus, *An American Dictionary of the English Language*, no doubt hoping it would sustain his family for decades thereafter.<sup>26</sup>

The effort began with an overture from Webster to his cousin Daniel Webster, then a member of the House of Representatives, in 1826, but Daniel took no action on it.<sup>27</sup> Four years later, though, Webster’s son-in-law William W. Ellsworth had been elected to Congress, and he introduced a copyright bill in 1830.<sup>28</sup> Webster would need to lobby in person, for a final time.

Webster “detested” President Andrew Jackson, and yet in December of 1830 he found himself dining with the President at the White House, keeping his various feelings of pique to himself as he advanced the cause of extending the copyright term.<sup>29</sup> Webster’s son-in-law, Rep. William Ellsworth, wrote a bill which modernized copyright law and provided for a 14 year extension of copyright, and now-Senator Daniel Webster, shepherded the bill through

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<sup>21</sup> DAVID MICKLETHWAIT, *NOAH WEBSTER AND THE AMERICAN DICTIONARY* 74-80 (2000);

<sup>22</sup> *Id.* at 211-21.

<sup>23</sup> E. JENNIFER MONAGHAN, *A COMMON HERITAGE: NOAH WEBSTER’S BLUE-BACKED SPELLER* 51 (1983).

<sup>24</sup> *Id.* at 51-53.

<sup>25</sup> *Id.*; Letter from Noah Webster to William Chauncey Fowler (Jan. 29, 1831), in *Letters of Noah Webster* 424, 424-25 (Harry R. Warfel ed., 1953) (“I cannot but hope I may now make dispositions of copyright which will make me comfortable during the remainder of my life, and secure to Mrs. Webster, if she should survive me, a decent independence.”)

<sup>26</sup> JOSHUA KENDALL, *THE FORGOTTEN FOUNDING FATHER: NOAH WEBSTER’S OBSESSION AND THE CREATION OF AN AMERICAN CULTURE* 303 (2010).

<sup>27</sup> Craig Joyce, “A Curious Chapter in the History of Judicature”: *Wheaton v. Peters* and the Rest of the Story (of Copyright in the New Republic), 42 *Hous. L. Rev.* 325, 340 (2005)

<sup>28</sup> *Id.*

<sup>29</sup> Kendall at 310. 315.

the Senate.<sup>30</sup> Noah Webster gave a lecture at the House of Representatives on January 3, 1831, to “remarkable effect,” and which Webster himself and others in attendance agreed raised the bill’s chances of success considerably.<sup>31</sup> Exactly a month later, the 1831 Copyright Act became law.<sup>32</sup>

The 1831 Copyright Act did far more than extend copyright – it simplified copyright notice, formally added music to copyright law, simplified deposit practice, improved registration recordkeeping, and more.<sup>33</sup> However, there isn’t much evidence of anyone but Webster lobbying to extend copyright term, and conversely there is strong evidence of Webster’s lobbying. Indeed, Webster’s fingerprints – and family – are all over the bill. Bizarrely, due to a drafting error, Webster was unable to take advantage of this term extension for works about to expire, only his widow and children were.<sup>34</sup> New works would get a 28 year initial term and the option of a 14 year renewal term.

With a measure as old as the 1831 Act, it’s difficult to determine if this conventional narrative is missing part of the story. If another author was quietly whispering in the halls of power stories and recollections of it would be likely long gone. All we have is a narrative which correlates well to the legal history, and which is unlikely to be disturbed absent a herculean effort.

### *B. The 1909 Extension*

By 1905 the existing copyright law, which was still fundamentally the 1790 Act with amendments, was in dire need of a revision. Following consultation with stakeholders, the Register of Copyrights prepared a comprehensive revision of copyright law, which would set the copyright term at life of the author plus fifty years, matching the term provided for in Berne Convention from two decades earlier.<sup>35</sup> At hearings in June of 1906, several witnesses were critical of copyright term extension, offering both prudential and constitutional arguments. In response, advocates “marshaled an impressive array of witnesses” for the next hearing on the bill in December of that year.<sup>36</sup> The leading character there was Samuel Clemens, better known as Mark Twain.

Clemens was already a veteran of the struggles for international

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<sup>30</sup> *Id.* at 317.

<sup>31</sup> Micklethwait at 216-217.

<sup>32</sup> Act of February 3, 1831, 21st Cong., 2d Sess., 4 Stat. 436.

<sup>33</sup> *Id.*

<sup>34</sup> Robert Brauneis, A Brief Illustrated Chronicle of Retroactive Copyright Term Extension, 62 J. Copyright Soc’y U.S.A. 479, 493-4 (2015). For his part Micklethwait asserts that this was not a drafting error but a cynical ploy by Ellsworth at his father-in-law’s expense. Micklethwait at 221.

<sup>35</sup> Memorandum Draft of a Bill to Amend and Consolidate the Acts Respecting Copyright §§ 51-52 (Oct. 23, 1905).

<sup>36</sup> Ochoa at 36.

copyright,<sup>37</sup> but his appearance at the hearing in 1906 would prove particularly memorable. Although it was winter, he wore the bright white summer suit with which he has come to be associated, and the effect was a “magnificent coup.”<sup>38</sup> However, Congress was simply not ready for a term of life plus fifty years, and a proposed compromise of life plus thirty years was rejected after authors pointed out in many cases it would actually be a reduction of the current term.<sup>39</sup> A term of 56 years, comprising a 14 year extension, was the ultimate result. And even though it was not the term he came to Congress to so dramatically defend, Mark Twain remains associated with the 1909 Copyright Law and its term extension.

### C. The 1976 Extension and Disney

From the mid-1920s through the 1930s copyright reform, including term extension, was frequently considered in Congress.<sup>40</sup> These proposals varied somewhat between a longer fixed term from publication to the Berne Convention term of life of the author plus fifty years, culminating in passage of a bill with a term of life+50 by the House of Representatives in 1940.<sup>41</sup> However, the session ended without Senate concurrence, and the coming of the war tabled the issue. Following the war the Copyright Office focused on internal modernization and the Universal Copyright Convention,<sup>42</sup> but in 1955 Congress requested that the Copyright Office study copyright law for purposes of a planned revision.<sup>43</sup> Although the 1957 Revision Report made no formal recommendation, in 1961 the Register’s Report suggested an initial term of 28 years with a renewal term of 48 years, or a 20 year extension of the renewal term.<sup>44</sup> There was “very little support” for this suggestion, and “strong sentiment” for a term of life+50,<sup>45</sup> which consistently appeared in bills for copyright revision in the long march to passage fifteen years following that 1961 report.

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<sup>37</sup> Martin T. Buinicki, *Protecting and Promoting Mark Twain: Samuel Clemens and the Uses of Copyright*, in *NEGOTIATING COPYRIGHT: AUTHORSHIP AND DISCOURSE OF LITERARY PROPERTY RIGHTS IN NINETEENTH CENTURY AMERICA* (2006).

<sup>38</sup> [https://www.copyright.gov/history/lore/pdfs/201411%20CLore\\_November2014.pdf](https://www.copyright.gov/history/lore/pdfs/201411%20CLore_November2014.pdf). This argues that this was the first time he ever wore the white suit, but that doesn’t seem to be true. [https://en.wikipedia.org/wiki/Mark\\_Twain#Legacy\\_and\\_depictions](https://en.wikipedia.org/wiki/Mark_Twain#Legacy_and_depictions)

<sup>39</sup> Ochoa at 38.

<sup>40</sup> Copyright Office Revision Study No. 30, *Duration of Copyright 62-70* (1957)

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

<sup>42</sup> ZSR, *Examining Copyright* at \_\_\_\_

<sup>43</sup> Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 *J. COPYRIGHT SOC’Y U.S.A.* 19, 39 (2001-2002).

<sup>44</sup> Report of The Register of Copyrights on The General Revision of The U.S. Copyright Law 55, 87th Cong. (1961).

<sup>45</sup> Supplemental Report of The Register of Copyrights on The General Revision of The U.S. Copyright Law X, 89<sup>th</sup> Cong. (1965).

But what of those works set to fall into the public domain during these fifteen years? During this period, the copyright term was extended ten times, so a copyright in its renewal term on or after September 19, 1962 had its renewal term extended to the end of 1976, at a minimum.<sup>46</sup> As such, the term extension that occurred formally in 1976, where the term of copyright was extended to life+50 for new works and 75 years (if renewed at 28 years) for existing published works, really occurred in slow motion during this fifteen year period.

At a hearing in May of 1962 the daughter of composer John Philip Sousa appeared and noted that she only received royalties on *The Stars and Stripes Forever* from Europe, and she “love[s] my country and I want her to treat me better than any other lands do.”<sup>47</sup> Works such as *The Jungle* by Upton Sinclair and writings by Helen Keller, both still living, were cited as being in danger of expiration.<sup>48</sup> Although Mark Twain had died long ago, a representative of his estate also testified.<sup>49</sup> However, during the lengthy testimony from music publisher Redd Evans, it came out that “a principal proponent of this legislation” was the Church of Christ, Scientist, and the affiliated Christian Science Monitor.<sup>50</sup> Due to broad support (aside from Evans only a lawyer from NBC gave his objection to the measure) it became law, although the measure was shortened from 1967 to 1965, on the theory that a full revision of copyright should be possible by then.<sup>51</sup>

The Christian Science Church, and its founder Mary Baker Eddy, were hardly new to the conversation about copyright policy.<sup>52</sup> The 1903 address which helped start the movement towards what would become the 1909 Act was written by Eddy’s copyright lawyer and advisor, Samuel Elder.<sup>53</sup> In 1906, Eddy was actively involved in lobbying for the copyright revision.<sup>54</sup>

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<sup>46</sup> Act of September 19, 1962, Pub. L. No. 87-668, 87th Cong., 2d Sess., 76 Stat. 555; Act of August 28, 1965, Pub. L. No. 89-142, 89th Cong., 1st Sess., 79 Stat. 581; Act of November 16, 1967, Pub. L. No. 90-141, 90th Cong., 1st Sess., 81 Stat. 464; Act of July 23, 1968, Pub. L. No. 90-416, 90th Cong., 2d Sess., 82 Stat. 397; Act of December 16, 1969, Pub. L. No. 91-147, 91st Cong., 1st Sess., 83 Stat. 360; Act of December 17, 1970, Pub. L. No. 91-555, 91st Cong. 2d Sess., 84 Stat. 1441; Act of November 24, 1971, Pub. L. No. 92-170, 92d Cong., 1st Sess., 85 Stat. 490; Act of October 25, 1972, Pub. L. No. 92-566, 92d Cong., 2d Sess., 86 Stat. 1181; Act of December 31, 1974, Pub. L. No. 93-573, 93d Cong., 2d Sess., 88 Stat. 1873.

<sup>47</sup> 1962 Hearing at 23.

<sup>48</sup> *Id.* at 26.

<sup>49</sup> *Id.* at 71.

<sup>50</sup> *Id.* at 53.

<sup>51</sup> H. Rep. 87-1742 (May 28, 1962).

<sup>52</sup> ANDREW VENTIMIGLIA, *COPYRIGHTING GOD: OWNERSHIP OF THE SACRED IN AMERICAN RELIGION* 115 (2019)

<sup>53</sup> *Id.* at 142.

<sup>54</sup> *Id.* at 145.

However, for the 1909 Act they were mostly in the background. The Church was much more visible for this legislation, and in 1971 they received a private bill extending certain of their copyrights even longer than they would have otherwise received “[a]fter heavy lobbying from the bill’s supporters, reportedly including Nixon administration officials John Ehrlichman and H. R. Haldeman, both Christian Scientists.”<sup>55</sup> This was the first (and to the author’s knowledge only) private copyright bill of the 20<sup>th</sup> century, and it was struck down in the next decade.<sup>56</sup>

Interestingly, while not opposed, the Walt Disney Company did not exhibit immediate enthusiasm for the idea of term extension. The Copyright Office, in conjunction with the ABA, met with stakeholders in 1963, proposing the terms which would eventually go into the 1976 Act.<sup>57</sup> While most involved were positive about the measure (with broadcasters being an exception), Spencer Olin and Elliott Levitas from Disney were nonplussed, and “questioned the monopoly aspects of an extended term.”<sup>58</sup> They further “expressed doubt that Congress would approve a longer copyright period for authors.”<sup>59</sup> While not an outright rejection of term extension, others like ASCAP and representatives of authors were much more enthusiastic.<sup>60</sup>

While the bulk of those involved supported term extension, opposition was more visible than in the past. For the initial extension in 1962, Attorney General Katzenbach wrote a letter opposing term extension, arguing that the current term was enough, and further showing concern about piecemeal extensions.<sup>61</sup> As the extensions continued and Congress remained deadlocked on the copyright bill, increasing notes of dissent and discontent were made from members of the House Judiciary Committee, although they never actually derailed an extension from being passed.<sup>62</sup> In 1976 the bill passed, establishing a copyright term for new or unpublished works of life+50, a 19 year extension of the renewal term for existing works to 47 years (so a total term of protection of 75 years), and protection for works for hire

<sup>55</sup> [https://www.copyright.gov/history/lore/pdfs/201102%20CLore\\_February2011.pdf](https://www.copyright.gov/history/lore/pdfs/201102%20CLore_February2011.pdf)

<sup>56</sup> United Christian Scientists v. Christian Sci. Bd. of Directors, First Church of Christ, Scientist, 829 F.2d 1152 (D.C. Cir. 1987).

<sup>57</sup> Mike Mossetig, *Looks Good for Authors to Achieve Longer Hold on Their Copyrights*, VARIETY, Aug. 21, 1963 at 2.

<sup>58</sup> *Id.* at 2, 15.

<sup>59</sup> *Id.*

<sup>60</sup> Interestingly, in an oral history done long afterwards, following a decade spent in Congress himself, Elliott Levitas recalled he had gone to England to lobby on Disney’s behalf regarding a copyright law seen as unfavorable, presumably the 1956 copyright act. [https://dlg.usg.edu/record/gych\\_rogp\\_042#text](https://dlg.usg.edu/record/gych_rogp_042#text)

<sup>61</sup> Letter from Nicholas deB. Katzenbach, Acting Deputy Attorney General, to Congressman Emanuel Celler (May 2, 1962); Lawrence Lessig, The Balance of Robert Kastenmeier, 2004 Wis. L. Rev. 1015, 1021 (2004).

<sup>62</sup> Lessig, *Id.*



for 75 years from publication or 100 years from creation, whichever was shorter. While it would take almost two decades to pass the 1976 Act, the delay was mainly due to the cable television provisions; term was relatively uncontroversial.

#### *D. Europe Extends in 1993*

Even as the United States was arriving at the Berne term of life of the author plus fifty years, there were already discussions of extending the term longer. Although the Berne Convention set a minimum of fifty years postmortem as the duration of copyright, nations were always free to set a longer term. The only caveat was that under the rule of the shorter term, a nation was free to only accord a work the term of its country of origin even though it would otherwise have a longer term in that nation.<sup>63</sup> Thus, for instance, Spain established a copyright term of life of the author plus 80 years in 1879. Following the World Wars, Italy and France granted extensions of copyright term to compensate authors for their losses during wartime, leading to a lack of uniformity in Europe.<sup>64</sup> The Permanent Committee for the Berne Convention discussed term extension at each of its meetings in 1959-1961, which led to the appointment of two Committees of Experts to consider the matter in 1961 and 1962.<sup>65</sup> These committees in turn recommended extension of term in excess of the current term of life plus fifty years.<sup>66</sup> With this background, in 1965 Germany extended its copyright term from the Berne Convention minimum of life plus fifty years to a term of life plus 70 years.<sup>67</sup>

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<sup>63</sup> E. Townsend Gard, J.D. Salinger and Copyright's Rule of the Shorter Term, 19 *Vanderbilt Journal of Entertainment and Technology Law* 777, 780 (2020)

<sup>64</sup> Italy extended copyright terms for six years in 1945. Deputy Legislative Decree No. 440 of July 20, 1945, extending the Term of Protection for Intellectual Property Rights and Works protected under Law No. 633 of April 22, 1941 (in Italian). WIPO lex (July 20, 1945). France extended copyright for whatever term constitutes “*annees de guerre*,” thus over six years for World War 1 and over eight years for World War 2. [https://larevue.squirepattonboggs.com/prorogations-de-guerre-et-duree-de-protection-des-oeuvres\\_a243.html](https://larevue.squirepattonboggs.com/prorogations-de-guerre-et-duree-de-protection-des-oeuvres_a243.html). These extensions were subsumed into the 1993 term extension.

<sup>65</sup> Ricketson, Sam, and Jane C Ginsburg, 'The Subsequent Development of the Berne Convention, 1886–1971', *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* at 110 no. 263, 3rd edn (Oxford, 2022; online edn, Oxford Academic, 23 June 2022).

<sup>66</sup> Germany, 1 RECORDS OF THE INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM 617 (1967).

<sup>67</sup> To quote the official history:

The copyright amendment of 1965 initially provided for the retention of the standard term of protection of 50 years. During the legislative process, disputes arose over the question of extending the standard term of protection to 60, 70 or even 80 years, also in connection with the question of whether and, if so, to what extent further use of the work after expiry of the standard term of protection should be subject to payment of a so-called “domain public

This set in motion a series of events which would lead a newly unified Europe to extend its copyright term three decades later.<sup>68</sup>

At the 1967 Stockholm Conference of the Berne Convention, Germany urged that copyright term be extended.<sup>69</sup> However, Germany did urge that the suggestion of the Committee of Experts be adopted, by “the determination of the extension of the term of protection by a special arrangement between the countries concerned.”<sup>70</sup> No action was taken, but the issue remained, and Israel extended its copyright term to life plus 70 (non-retroactively) in 1971.<sup>71</sup> In 1972 Austria followed Germany’s lead and also extended its copyright term to life+70.<sup>72</sup> In October of 1980 the European Commission held a hearing in Brussels regarding the possibility of copyright term extension, but the matter was “not followed by concrete measures.”<sup>73</sup> Over the next decade, though, a drumbeat began of nations extending copyright protection to life plus 70. In 1985, at the urging of music publishers and supported by economic data, France extended the copyright term for music to life plus 70 years for composers.<sup>74</sup> In 1987, Spain reduced its copyright term from life plus 80 to life plus 70, in the interest of harmonization.<sup>75</sup>

Looking retrospectively the pace of activity towards a European term extension quickened. In a dispute decided in early 1989 over importation of phonorecords from Denmark (where they were legally made) to Germany

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payant.” This would at least ensure the continuation of the obligation to pay remuneration for further use even after the expiry of the standard term of protection, even if this remuneration were then no longer to be paid to the author and his legal successors, but to a fund for the promotion of general creativity under copyright law, which is still to be defined in more detail. This idea of a remuneration for the succession of the author was then rejected in the further legislative process in favor of an extension of the standard term of protection from 50 to 70 years, which was also justified at the same time with the generally increased life expectancy.

BeckOK Urheberrecht/Freudenberg, 38. Ed. 1.5.2023, UrhG § 64 Rn. 9) (translation courtesy of and special thanks to Mirko Brüß).

<sup>68</sup> Zombie and Once-Dead Works: Copyright Retroactivity After the E.C. Term Directive, Ent. & Sports Law., SUMMER 2000, at 7 (This “provided the model that the E.C. Term Directive later followed”), *quoted in* Peter K. Yu, *Deferring Intellectual Property Rights in Pandemic Times*, 74 HASTINGS L.J. 489, 542 (2023).

<sup>69</sup> *Supra* note 66.

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

<sup>71</sup> Copyright Ordinance Amendment No. 3) Law, 5731-1971, No. 58, 25 L.S.I. 157.

<sup>72</sup>

[https://archive.ph/20041125094906/http://www.wipo.int/clea/docs\\_new/en/at/at004en.html](https://archive.ph/20041125094906/http://www.wipo.int/clea/docs_new/en/at/at004en.html)

<sup>73</sup> Silke von Lewinski, *The EC Duration Directive: An Example of the Complexity of EC Copyright Harmonization*, in 4 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 257, 258 (Peter K. Yu ed., 2007).

<sup>74</sup> *Id.* at 260-261.

<sup>75</sup> Law 22/1987

(where they were infringing) the European Court of Justice held that the owner of the copyright in Germany could prevent importation.<sup>76</sup> The Court's "reference to the 'present state of Community law' constituted a request addressed to the [European] Commission to remove these barriers by adopting [copyright term] harmonization measures."

That year and into the next the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement was being reached, which provided *inter alia* additional minimum standards for copyright protection than required by the Berne Convention. While and after this was ongoing, the World IP Organization (WIPO) had been considering additional copyright protection measures, and in late 1991 and early 1992 in Geneva there was discussion of a Protocol to the Berne Convention.<sup>77</sup> While a consensus did not exist, there was at least some urging that the Berne Protocol include a longer minimum copyright term than life plus fifty. We will return to the Berne Protocol later, as it became the WIPO Copyright Treaty.

As term extension fell out of the Berne Protocol in early 1992, the focus of those interested in term extension shifted to the European Community, which would shortly become the European Union. Switzerland, Belgium, and Greece all had draft laws which would extend copyright to life of the author plus 70 under consideration by this point.<sup>78</sup> The European Commission had the goal of a unified single market by the end of 1992, and wanted to avoid transitional measures.<sup>79</sup> As some members already had terms of life plus 70, any shorter term would violate the principle of respecting established rights, or would require transitional measures for a long time.<sup>80</sup> Accordingly, a term of life plus seventy years was chosen, although it would take years for the member states to make that law. Although the vote was not unanimous,<sup>81</sup> in June 1993, the European Community Member States ("EC") updated its protection of copyrights to life of the author plus seventy years.<sup>82</sup>

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<sup>76</sup> Judgment of the Court (Sixth Chamber) of 24 January 1989. - EMI Electrola GmbH v Patricia Im- und Export and others. - Reference for a preliminary ruling: Landgericht Hamburg - Germany. - Copyright - Different protection periods. - Case 341/87.

<sup>77</sup> <https://tind.wipo.int/record/20135>

<sup>78</sup> Lewinski, *supra* note 73 at 260.

<sup>79</sup> *Id.* Of course, another way of putting this is that the employees of the EC had offices and job titles, but no actual job yet, and the Copyright Directive was necessary to their institutional interests.

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

<sup>81</sup> N. Dawson, *Copyright in the European Union--Plundering the Public Domain*, 45 N. IRELAND LEGAL Q. 193, 202 (1994)

<sup>82</sup> In the Matter of: Duration of Copyright Term of Protection, Docket No. RM 93-8, at 4 (1993). In 1992, the European Community Member States was a group consisting of "three economic associations: the European Economic Community, the European Coal and Steel Community, and the European Atomic Energy Community." Will Kenton, *What Was the*

### III. FIRST ATTEMPTS AT EXTENSION

The month following the EC Copyright Directive on Duration, the U.S. Copyright Office put out a Notice of Inquiry which began the process of considering an extension to copyright term in the United States to match the new term in Europe.<sup>83</sup> The effort would ultimately take five years, reflecting both the general difficulty in passing legislation and other priorities. At the time Congress was considering a law called the Copyright Reform Act to modernize Copyright Office operations, as well as moving to the Copyright Office inside the Patent and Trademark Office.<sup>84</sup> The following year Congress would pass the Uruguay Round Agreements Act, which *inter alia* restored copyrights in those works by foreign authors which had fallen into the public domain for failure to comply with US Copyright formalities.<sup>85</sup> In 1995 a performance right for sound recordings was created for the first time, but it was limited to digital performances only, with radio play and other traditional broadcasting methods excluded.<sup>86</sup> Meanwhile, the legislative process continued for term extension.

#### A. *First Discussions at the Copyright Office*

In September of 1993, the United States Copyright Office held a public hearing discussing whether it made sense for it to do the same as it would be required to update its protection term if the Berne Convention adopted the extension.<sup>87</sup> In its Notice of Public Hearing and Notice of Inquiry, the

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*European Community (EC)? Definition and History*, INVESTOPEDIA (Aug. 27, 2021), [https://www.investopedia.com/terms/e/european-community.asp#:~:text=The%20European%20Community%20\(EC\)%20was,Union%20\(EU\)%20in%201993.](https://www.investopedia.com/terms/e/european-community.asp#:~:text=The%20European%20Community%20(EC)%20was,Union%20(EU)%20in%201993.) It included Belgium, Germany, France, Italy, Luxembourg, and the Netherlands. *Id.* This was replaced by the European Union through the Maastricht Treaty which went into effect in 1993 and added Great Britain, the Irish Republic, Spain, Portugal, Greece, and Denmark. *Id.*; History.com Editors, *European Union Goes into Effect*, HISTORY.COM (Oct. 29, 2020), <https://www.history.com/this-day-in-history/european-union-goes-into-effect#:~:text=By%201993%2C%2012%20nations%20had,%2C%20Belgium%2C%20and%20the%20Netherlands.>

<sup>83</sup> Notice of Public Hearing and Notice of Inquiry, Duration of Copyright Term Protection, 58 Federal Register 1-2 (Jul. 30, 1993), <https://cdn.loc.gov/copyright/history/mls/ML-465.pdf>

<sup>84</sup> The Copyright Reform Act included provisions such an appeal board for examination rejections of copyrights, which the Copyright Office set up in 1995 even though the bill never became law. Zvi S. Rosen, *Examining Copyright*, \_\_\_ JOURNAL OF THE COPYRIGHT SOCIETY OF THE USA \_\_\_ (forthcoming).

<sup>85</sup> Uruguay Round Agreements Act, P.L. 103-465, 108 Stat. 4809. (1994).

<sup>86</sup> Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”), Public Law 104-39 (1995).

<sup>87</sup> Notice of Public Hearing and Notice of Inquiry, Duration of Copyright Term Protection, 58 Federal Register (Jul. 30, 1993), [chrome-](https://www.federalregister.gov/documents/1993/07/30)

Copyright Office noted reasons for the amendment of the 1976 Act which extended the copyright protection term from 56 years to life of the author plus fifty years.<sup>88</sup> It presented the seven reasons given in a House Report, including, increased “economic benefits” due to high life expectancy, growing communication within the media which “lengthened the commercial life of many works,” shorter term results in economic harm to the author as consumers tend to pay the same amount for the work even after it enters the public domain, easier tracking of works’ publishing dates, elimination of renewals, compensation for loss of common law protections, and adherence to the Berne convention.<sup>89</sup> At the hearing Eric Schwartz of the Copyright Office further noted that one of the major deciding factors for the term extension in 1976 was the availability of further termination rights for authors.<sup>90</sup>

Three witnesses appeared at the hearing to provide commentary, including, Hal David (“David”), a lyricist, on behalf of the Coalition of Creators and Copyright Owners; Susan Mann (“Mann”), a copyright attorney, on behalf of the National Music Publishers’ Association (“NMPA”), Music Publishers’ Association (“MPA”) and International Confederation of Music Publishers (“ICMP”); and Bernard Sorkin (“Sorkin”), a copyright attorney for Time Warner, Inc., on behalf of the Motion Picture Association of America.<sup>91</sup>

David noted that the EC is an enormous market for copyrighted material created within the United States and to not allow for the same amount of protection to those authors as in the EC would be a disservice to authors’

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extension://efaidnbmnnnibpcajpcglclefindmkaj/https://cdn.loc.gov/copyright/history/mls/M L-465.pdf. *See also* In the Matter of: Duration of Copyright Term of Protection, Docket No. RM 93-B, at 4 (1993). The public comments from this docket are missing, and the Copyright Office has been unable to locate them. I was able to locate a transcript of the hearing while serving as the Abraham L. Kaminstein Scholar in Residence at the U.S. Copyright Office.

<sup>88</sup> 1976 Act

<sup>89</sup> (citing HR. Rep. No. 1476.94th Cong., 2d Sess. 134-135 (1976).). The Berne Convention enforces a minima of term protection last the author’s life plus fifty years. Title 7 para. 1, Berne Convention for the Protection of Literary and Artistic Works as amended Sept. 28, 1979, <https://www.wipo.int/wipolex/en/text/283698>.

<sup>90</sup> In the Matter of: Duration of Copyright Term of Protection, Docket No. RM 93-B, at 44 (1993).

<sup>91</sup> *Id.* at 46 (1993). Also present representing the Coalition of Creators and Copyright Owners were Morton Gould, President of ASCAP; Pat Alger, a country music songwriter; Thea Zaven, Executive VP of BMI; Karen Sherry, Director of Public Affairs for ASCAP; and, Fred Koenigsberg, Special Counsel to ASCAP. *Id.* at 20-21 (1993). Present to speak on behalf of Music Publishers’ Association and International Confederation of Music Publishers as well was Charles Sanders, a copyright attorney and Special Assistant to the President of NMPA. *Id.* at 21 (1993). Senior Vice President of the Motion Picture Association, Fritz Attaway, accompanied Bernard Sorkin. *Id.* at 47 (1993).

contributions to society.<sup>92</sup> He also asserted that failure to extend this protection would seem to impede the creativity that the Copyright Act is meant to promote.<sup>93</sup> Mann emphasized the increase in life expectancy of authors and the trend having children at later ages resulting in less security of copyright benefits to the family of authors.<sup>94</sup> She also noted that the contributions of authors' creativity increasingly supported the U.S. economy.<sup>95</sup> Mann asserted that the NMPA supported, along with the MPA and the ICMP, amendments to the Copyright Act in order to support "the authors' families, . . . [protect] the U.S. balance of trade and the U.S. public interest as well."<sup>96</sup> Mann summarized the comments of ICMP as well, stating that "ICMP argued unsuccessfully before the EC Commission for national treatment by member state in extending the full available term of protection to works of foreign nationals" as a reason for urging the U.S. to seriously consider conforming to the term extension of the EC.<sup>97</sup> Mann asserts that the operative documents explaining the policy behind life plus twenty years could be found in the WIPO comments and "documents prepared for the Berne Protocol discussions . . . in June [of 1993 that] summariz[ed] early deliberations on [Copyright term extension]."<sup>98</sup> Sorkin detailed the interests of the American motion picture industry which he asserted was "one of the few American products to which there [was] a favorable balance of trade."<sup>99</sup>

Sorkin was the only witness who discussed a term extension for works for hire as well since production of motion pictures is generally a work for hire service.<sup>100</sup> All witnesses focused on the amount of funding it took (and likely still takes) to produce these works of authorship was enormous.<sup>101</sup> Because of this, all of the witnesses asserted that the producers of these works had just as much stake in term extension as the creators.<sup>102</sup>

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<sup>92</sup> *Id.* at 5-11 (1993).

<sup>93</sup> *Id.* at 18 (1993).

<sup>94</sup> *Id.* at 24 (1993). Note, however, the Ms. Schrader points out that in the comments received from the Coalition, it indicates that the "U.S. life expectancy ha[d] only increased about five or six years from 1964." *Id.* at 34.

<sup>95</sup> *Id.* at 26 (1993) (referencing a "1992 report prepared for the International Intellectual Property Alliance . . . [which] estimated that the American copyright industries account[ed] for nearly 6 percent of the U.S. gross national product.").

<sup>96</sup> *Id.* at 28 (1993).

<sup>97</sup> *Id.* at 39 (1993).

<sup>98</sup> *Id.* at 35 (1993) (indicating that life plus seventy years was the most rational focus point as it was the international average).

<sup>99</sup> *Id.* at 47 (1993).

<sup>100</sup> *Id.* at 51 (1993).

<sup>101</sup> *See e.g., Id.* at 52 (1993) (Fritz Attaway supplied that for motion pictures the "[n]egative costs [were] around 24 million and another 10 to 15 million promotional costs.").

<sup>102</sup> In the Matter of: Duration of Copyright Term of Protection, Docket No. RM 93-B (1993).

The questioning by the panel tended to focus on the constitutionality of extending the longer term to prior works and how the extension could affect the plans for derivative uses of those works that were set to enter the public domain.<sup>103</sup> The panel also inquired about the feasibility of any funds accumulated from the extension period could go into “a fund for the benefit of artists or the arts . . . similar to the National Endowment for the Arts.”<sup>104</sup> It is important to note that the three witnesses spoke merely from the viewpoint of those with a stake in music and motion pictures.<sup>105</sup>

### *B. A First Bill and Hearings*

Bill introduced, hearings are held 1994-5.

However noble the intentions of the proponents for the bill, there were still of course people arguing that it was not the best tactic, and one reason was that it actually benefitted the people who purchased copyrights rather than the original owners of the copyrights.<sup>106</sup> In fact, William F. Patry (“Patry”), Associate Professor of Law at the Benjamin N. Cardozo School of Law, asserted that at least the music publishers would have “oppose[d] any bill that [would have] give[n] the copyright to authors.”<sup>107</sup> Patry argued that if that was true then the bill would go against everything the constitution’s goal of protecting the author.<sup>108</sup> Therefore, Patry argued that the term extension only protected the large corporation as it does not give the individual author the chance to negotiate new purchase terms in light of the term extension.<sup>109</sup> At a committee hearing in July of 1995, Dennis Karjala, a Professor of Law at Arizona State University, speaking on behalf of the U.S. Copyright and Intellectual Property Law Professors, fought for the so-called “little guy.”<sup>110</sup> He argued that prolonging works of authorships’ inevitable fall into the public domain would stifle the creation of new works built upon the “building blocks” created by old works.<sup>111</sup> He indicated that extending

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<sup>103</sup> *Id.* at 32 (1993).

<sup>104</sup> *Id.* at 36 (1993).

<sup>105</sup> In the Matter of: Duration of Copyright Term of Protection, Docket No. RM 93-B (1993).

<sup>106</sup> William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors*, 14 *Cardozo Arts & Entertainment L.J.* 661 (1995).

<sup>107</sup> *Id.* at 662.

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

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

<sup>110</sup> Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Hearings Before the Subcomm. on Cts. & I.P. of the H. Comm. on the Judiciary, 104th Cong. 290 (1995) (statement of Dennis S. Karjala, Professor of Law, Arizona State University, on Behalf of the U.S. Copyright and Intellectual Property Law Professors).

<sup>111</sup> *Id.* at 290 (statement of Dennis S. Karjala, Professor of Law, Arizona State University, on Behalf of the U.S. Copyright and Intellectual Property Law Professors).

the term of protection would ultimately throw out the carefully laid balance between the private and public interests associated with copyright.<sup>112</sup> William Patry, a Professor at the Benjamin N. Cardozo College of Law, opposing the bill as well, noted that not many authors would be considered “winners” under the terms as drafted at the time of the July 1995 hearing.<sup>113</sup> He gave the example that, often, in the “forties and fifties and sixties [jazz musicians] had to sign rather unfair contracts.”<sup>114</sup> He argued that, as drafted, the bill would only protect the person or entity that had purchased the copyrights from the author but not the author or their families by making those individuals locked into those “very unfair contracts.”<sup>115</sup> He also cited to Mr. Bono’s statement at a hearing in Pasadena where he observed “that 99 percent of the songwriters and their families would want their copyright back, if you asked them.”<sup>116</sup>

In a hearing in front of the Subcommittee on Courts and I.P in June of 1995 representatives from the music and movie industries, as well as artists testified their support for the bill.<sup>117</sup> Jack Valenti, the President and CEO of the Motion Picture Association of America in 1995, though in full support of the term extension, noted that some people argued that “the consumer would be benefited because more public domain works” would become available.<sup>118</sup> Valenti then argued, however, that even if it would allow for works of authorship to become more widely available, the quality of that work will start to fall due to the lack of investment in its preservation without protection of rights to the work.<sup>119</sup> Edward P. Murphy (“Murphy”), President and CEO of NMPA, argued that the bill helped the author in the music industry specifically because “publisher is the business side of a partnership with the music creator,” and therefore was in the concurrent interests of both publisher and author.<sup>120</sup> Murphy noted that the original act from 1790 accomplished a balance between the interests of the authors and the publishers of the authors’ works.<sup>121</sup>

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<sup>112</sup> *Id.* at 290-91 (statement of Dennis S. Karjala, Professor of Law, Arizona State University, on Behalf of the U.S. Copyright and Intellectual Property Law Professors).

<sup>113</sup> *Id.* at 312 (statement of William F. Patry, Professor at Benjamin N. Cardozo College of Law).

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

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

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

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

<sup>118</sup> *Id.* at 54 (statement of Jack Valenti, President, Motion Picture Association of America).

<sup>119</sup> *Id.* at 54-55 (statement of Jack Valenti, President, Motion Picture Association of America).

<sup>120</sup> *Id.* at 74 (statement of Edward P. Murphy, President & CEO, National Music Publishers’ Association, Inc.).

<sup>121</sup> *Id.* at 75 (statement of Edward P. Murphy, President & CEO, National Music



Authors, and even some family of authors who had passed, also testified or contributed statements and letters indicating their support for the bill at the subcommittee hearings in 1995.<sup>122</sup> Michael Weller (“Weller”), a playwright, screenwriter, and member of the Writers Guild of America, stated that “[he] support[ed] any effort to protect [his] work and [his] colleagues’ work from mutilation by future owners and exploiters.”<sup>123</sup> He compared being an artist who sells stories to that of the tradesman who makes the product and it belongs to him until he decides to sell it, painting a story of how his legacy could only last a limited amount of time.<sup>124</sup> Henry Mancini’s widow urged the committee to extend copyright protection so that Mancini’s works could continue on without change.<sup>125</sup> In a second hearing in July of 1995, Quincy Jones, on behalf of AmSong Inc., introduced multiple prepared statements into the record including those from Bob Dylan and Don Henley, among others.<sup>126</sup> He also testified to his own concerns as a songwriter if the extension was not passed by noting his legacy would be interfered with if not.<sup>127</sup> Bob Dylan prepared a statement in support of the bill.<sup>128</sup> He voiced concerns regarding the ownership of his copyrighted works during his grandchildren’s lifetimes and urged the committee to propel the bill into legislation.<sup>129</sup> Don Henley, a songwriter, music publisher, and recording artist, asserted that he was extremely particular about how his works of authorship were licensed and was distressed by the limited term given to him to protect those rights.<sup>130</sup>

### C. *The Initial Failure to Extend*

The Copyright Term Extension Act of 1995 (H.R.989) was introduced in February of 1995 in the House.<sup>131</sup> In opening remarks for the senate floor debate, Carlos J. Moorhead emphasized the important of conformity with

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Publishers’ Association, Inc.).

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

<sup>123</sup> *Id.* at 132 (statement of Michael Weller, Playwright, Screenwriter, and Member, Writers Guild of America, East).

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

<sup>125</sup> *Id.* at 132 (statement of Mrs. Henry Mancini, widow of Henry Mancini).

<sup>126</sup> *Id.* at 234 (statement of Quincy Jones, Songwriter & Member, AmSong, Inc.) (statements were also introduced from “Stephen Sondheim, Alan Menken, Ellen Donaldson, and Mrs. Henry Mancini.”).

<sup>127</sup> *Id.* at 235 (statement of Quincy Jones, Songwriter & Member, AmSong, Inc.).

<sup>128</sup> *Id.* at 240 (statement of Bob Dylan, songwriter).

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

<sup>130</sup> *Id.* at 241 (statement of Don Henley, a songwriter, music publisher, and recording artist).

<sup>131</sup> *All Actions: H.R.989 — 104th Congress*, CONGRESS.GOV (1995-1996), <https://www.congress.gov/bill/104th-congress/house-bill/989/allactions?overview=closed&s=4&r=43&q=%7B%22search%22%3A%5B%22copyright+extension%22%5D%7D#tabs> (last visited Mar. 28, 2023).

international law as suggested above in the committee hearing and asserted the “main reasons for th[e] extension of term [were] fairness and economics.”<sup>132</sup> The Copyright Term Extension Act of 1996 (S.483) was introduced in the Senate in the following month, and was placed on the Senate Legislative Calendar for July 1996.<sup>133</sup> In opening remarks, Sen. Hatch echoed Rep. Moorhead’s assertions and also noted works that would not be protected further if the bill was not passed within the year.<sup>134</sup> A senate debate for the Copyright Term Extension Act of 1995 suggested that the bill should have been adopted because it was within the history and tradition of the Copyright Act to update term protections to comply with international law and the Berne Convention.<sup>135</sup> Further, the report asserts that the “life-plus-50 term” was “no longer sufficient to protect adequately [the] Nation’s economic interests in copyrighted works, and more importantly, the interests of American authors and their families.”<sup>136</sup> It pointed to other countries outside of the European Union (“EU”) that were also adjusting their laws to match.<sup>137</sup>

Marybeth Peters, the Register of Copyrights and the Associate Librarian of Congress for Copyright Services, noted at a committee hearing that, in the past, copyright owners could merely avoid putting their works into markets where their works were not protected but with increase in “information society” it was harder and harder to avoid it as the “markets [were now] global.”<sup>138</sup> Since the directive for the EU limited the copyrights of works held by owners that are outside the EU to the term that their origin of creation, the rights of the owner would not be protected as long as the works created in those countries.<sup>139</sup> However, the reports notes that Congress has long recognized that the term of protection set by the Copyright Act is for the life of the author and then for one generation of their heirs.<sup>140</sup> The EU directive determined that it should actually protect those rights for the life of the author but also two succeeding generations of the author’s heirs.<sup>141</sup> The report determined that the previous term set by the Copyright Act of 1976, extending the term to life-plus-50, was “no longer sufficient to protect two

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<sup>132</sup> 141 CONG. REC. 379 (statement of Hon. Carlos J. Moorhead) (1995).

<sup>133</sup> *All Actions: S.483 — 104th Congress*, CONGRESS.GOV (1995-1996), <https://www.congress.gov/bill/104th-congress/senate-bill/483/allactions?q=%7B%22search%22%3A%5B%22copyright+extension%22%5D%7D&s=5&r=42&overview=closed#tabs> (last visited Mar. 28, 2023).

<sup>134</sup> 141 CONG. REC. 3390 (1995).

<sup>135</sup> S. Rep. No. 104-315, at 6 (1996).

<sup>136</sup> S. Rep. No. 104-315, at 7 (1996).

<sup>137</sup> S. Rep. No. 104-315, at 7 (1996).

<sup>138</sup> S. Rep. No. 104-315, at 8 (1996).

<sup>139</sup> S. Rep. No. 104-315, at 10 (1996).

<sup>140</sup> S. Rep. No. 104-315, at 10 (1996).

<sup>141</sup> S. Rep. No. 104-315, at 10 (1996).

generations of an author's heirs."<sup>142</sup> Edward P. Murphy ("Murphy"), President and CEO of NMPA, urged the subcommittee members to take a look at the problems surrounding the terms of "transfers of rights" as this was an issue considered for the Copyright Act of 1976.<sup>143</sup> It recognized that although the minimum set by the Berne Convention was only life-plus-50, keeping the current term would "permit countries with longer terms to limit protection of foreign works to the shorter term of protection granted in the country of origin."<sup>144</sup> This note hit home at what most of the larger organizations and publishers were concerned with in their testimony.<sup>145</sup>

The committee submitted its report on July 10, 1996, stating the bill's purpose as "to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works."<sup>146</sup> However, no further action was taken in the 104<sup>th</sup> Congress.

#### IV. PASSING TERM EXTENSION

The 105<sup>th</sup> Congress would prove especially consequential for copyright law. Although this paper is focused on term extension, term extension was one of several legislative priorities for copyright owners – and not the most significant one. A legislative overruling of the *La Cienega* case holding that sale of a sound recording constituted publication of the underlying musical composition was especially important to the music sector.<sup>147</sup> Database and vessel hull protection were both being considered. But more important than all of these, even more important than term extension, was the Digital Millennium Copyright Act. To those who were involved at the time, term extension was a sideshow (albeit one very important to some), while the DMCA was the main event.

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<sup>142</sup> S. Rep. No. 104-315, at 10 (1996).

<sup>143</sup> Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Hearings Before the Subcomm. on Cts. & I.P. of the H. Comm. on the Judiciary, 104th Cong. 75 (1995) (statement of Edward P. Murphy, President & CEO, National Music Publishers' Association, Inc.).

<sup>144</sup> S. REP. NO. 104-315, at 8 (1996).

<sup>145</sup> In the Matter of: Duration of Copyright Term of Protection, Docket No. RM 93-B (1993); Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Hearings Before the Subcomm. on Cts. & I.P. of the H. Comm. on the Judiciary, 104th Cong. 240 (1995).

<sup>146</sup> S. REP. NO. 104-315, at 3 (1996).

<sup>147</sup> *La Cienega Music Company v. ZZ Top*, 53 F.3d 950 (1995). Congress passed a measure overruling the case in November of 1997. Title 17 Technical Amendments, Pub. L. No. 105-80, 111 Stat. 1534 (1997); Jonathan C. Stewart and Daniel E. Wanat, *Entertainment and Copyright Law: Section 303 of the Copyright Act Is Amended and a Pre-78 Phonorecord Distribution of a Musical Work Is Not a Divestitive Publication*, 19 LOY. L.A. ENT. L. REV. 23 (1998).

A. *Legislative Proposals in 1994 and Coming Tech*  
Bill introduced 1994, gets traction but ultimately failed.

B. *The WIPO Copyright Treaty*

Common story is that after this went to WIPO and got by treaty what Congress wouldn't give. Is that true?

C. *The Music Fairness Act*

Ever since it was made clear that bars and restaurants needed to pay for performing copyrighted music, it has provoked resistance from the owners of those establishments.<sup>148</sup> In the 1930s and 40s, state legislators considered – and sometimes passed – so-called “anti-ASCAP” bills to hinder the ability of composers to collect royalties for such performances.<sup>149</sup> With composers lobbying hard for term extension, bar and restaurant owners saw an opportunity to get a concession from them in the bill – and Rep. Jim Sensenbrenner of Wisconsin saw an opportunity to get something for his constituents.

The Fairness in Music Licensing Act of 1997 (“Music Licensing Act”), introduced as H.R.789, was added as an amendment to Title 17 in combination with the Sonny Bono Copyright Extension Act of 1998 (“Sonny Bono Act”).<sup>150</sup> This amendment was introduced on February 13, 1997, by Rep. Sensenbrenner and many cosponsors for the “Exemption of Certain Music Uses from Copyright Protection.”<sup>151</sup> This was proposed after Sensenbrenner received multiple calls from constituents complaining about the “music police.”<sup>152</sup> He alleged that owners of establishments alerted him that “ASCAP auditors visited a string of bars surrounding Pewaukee Lake near Milwaukee” and would wait until a song came on the television via a commercial then would “announced that they had violated the copyright law, produced a contract and asked them to pay up.”<sup>153</sup>

The proposed bill requested four amendments to Title 17: exempting some forms of music use from copyright protection, adding a binding arbitration section if “performing rights societies” and “general music user[s]” cannot come to licensing fee agreements, suggesting “radio per

<sup>148</sup> *Herbert v. Shanley Co.*, 242 U.S. 591 (1917).

<sup>149</sup> Zvi S. Rosen., *Common-Law Copyright*, 85 U. Cinn. L. Rev. 1055, 1085 (2018).

<sup>150</sup> Fairness in Music Licensing Act of 1997, H.R. 789, 105th Cong. (1997); Sonny Bono Copyright Term Extension Act, S. 505, 105th Cong. Title II (1998); 17 U.S.C. § 110 (2005).

<sup>151</sup> Fairness in Music Licensing Act of 1997, H.R. 789, 105th Cong. § 2 (1997). It may or may not be relevant that Rep. Sensenbrenner's home state of Wisconsin has an unusual number of drinking establishments relative to population. Dan Shafer, *Most of America's Drunkiest Cities are in Wisconsin*, MILWAUKEE MAG., May 16, 2016, available at <https://www.milwaukeeemag.com/most-of-americas-drunkest-cities-are-in-wisconsin/>.

<sup>152</sup> Lou Carlozo, *The Sound of Money*, CHICAGO TRIBUNE (Aug. 12, 1996, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-1996-08-12-9608120147-story.html>.

<sup>153</sup> *Id.*

programming period license[s],” and access to repertoires as well as limiting the infringement actions, and removing vicarious liability for landlords of establishments for copyright infringement when tenants host public performances.<sup>154</sup>

However, there was significant debate regarding the balance required to be struck between the music user and the copyright holder.<sup>155</sup> Senator Kennedy, in a Senate floor debate regarding the Sonny Bono Copyright Term Extension Act, noted that the Sonny Bono Act was held up due to debate regarding the Music Licensing Act.<sup>156</sup> Representative Howard Coble, the Chairman of the Subcommittee on Courts and Intellectual Property, noted in a “oversight hearing on music licensing and restaurant and retail and other establishments,” held in July of 1997, that he had been receiving calls from both sides requesting he follow their directives.<sup>157</sup> The Music Licensing Fairness Coalition (“Coalition”) had offered a proposal that “would exempt restaurants, taverns, retail, and other establishments” from the § 110(5) requirement of paying licensing fees when those establishments provided “performances broadcast over radio and television equipment” unless the establishment charged for the customers to view/listen to the performance or it is was not “incidental to the purpose of the establishment.”<sup>158</sup> The proponents argued that these establishments are often showing programs that the broadcaster has already paid a license for or playing music on a radio of which the radio station has already paid a license for.<sup>159</sup>

<sup>154</sup> Fairness in Music Licensing Act of 1997, H.R. 789, 105th Cong. (1997).

<sup>155</sup> 144 Cong. Rec. 11673 (1998) (statement of Sen. Edward Kennedy); Music Licensing in Restaurants and Retail and Other Establishments: Hearing on H.R. 789 before the Subcommittee on Courts and Intellectual Property, H. Committee on the Judiciary, 105th Cong. 3 (1997), [http://commdocs.house.gov/committees/judiciary/hju43667.000/hju43667\\_0.HTM](http://commdocs.house.gov/committees/judiciary/hju43667.000/hju43667_0.HTM) (statement of Rep. Howard Coble).

<sup>156</sup> 144 Cong. Rec. 11673 (1998) (statement of Sen. Edward Kennedy).

<sup>157</sup> See Music Licensing in Restaurants and Retail and Other Establishments: Hearing on H.R. 789 before the Subcommittee on Courts and Intellectual Property, H. Committee on the Judiciary, 105th Cong. 3 (1997), [http://commdocs.house.gov/committees/judiciary/hju43667.000/hju43667\\_0.HTM](http://commdocs.house.gov/committees/judiciary/hju43667.000/hju43667_0.HTM) (statement of Rep. Howard Coble) (“For the past 2 1/2 to 3 weeks, I have had no fewer than 15 people call me with their requests—perhaps ‘direction’ might be a better word. Their orders have involved these two situations: ‘Now, Coble, I am expecting you to get this bill killed,’ on the one hand. On the other hand, ‘Now, Coble, I am counting on you to get this bill out before the full committee and on the floor and into law before the end of this year.’”).

<sup>158</sup> Music Licensing in Restaurants and Retail and Other Establishments: Hearing on H.R. 789 before the Subcommittee on Courts and Intellectual Property, H. Committee on the Judiciary, 105th Cong. 2 (1997), [http://commdocs.house.gov/committees/judiciary/hju43667.000/hju43667\\_0.HTM](http://commdocs.house.gov/committees/judiciary/hju43667.000/hju43667_0.HTM) (statement of Rep. Howard Coble).

<sup>159</sup> *Id.* at 314 (prepared statement of The National Federation of Independent Business).

On the other side, the performing rights societies argued that those types of performances were substantial to the marketing and sales for the authors.<sup>160</sup> At the oversight hearing, Representative Sonny Bono admonished the drafters of this proposition, particularly noting “reason particular restaurants want to have radio music broadcast for their customers is to attract financial gain without the author's permission or compensation.”<sup>161</sup> He went even further to say that it was an attempt to take away a constitutional right.<sup>162</sup>

The compromise eventually reached and included in the Sonny Bono Act, in Section 110, provided exemptions for certain food and drinking establishments under “2,000” and “3,750 gross square feet of space” not including the space used for parking only (expanding the § 110(5) “homestyle exception” included in the Copyright Act).<sup>163</sup>

[Sonny Bono Widow reaction – she hated it]

US advocates of term extension had been in conversation with SESAC and other European rights agencies, leading Europe to immediately bring action at WTO, as the new law violated the Berne Convention. ASCAP et al thought losing at the WTO (which the US did) would lead to repeal of the Music Fairness Act, but instead the United States just shrugged it off.<sup>164</sup> After an initial payment of the fine (supposed to be annual) the new status quo seems to have been more or less accepted.

#### D. Who actually Favored Extension?

Writing in 2002, Paramount Pictures Senior Vice President took on a wide array of “myths” regarding the Copyright Term Extension Act.<sup>165</sup> The 10<sup>th</sup> and final myth addressed was divided into five sub-myths, and the final one was “[t]he CTEA was Special-Interest Legislation that Only Disney

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

<sup>161</sup> Music Licensing in Restaurants and Retail and Other Establishments: Hearing on H.R. 789 before the Subcommittee on Courts and Intellectual Property, H. Committee on the Judiciary, 105th Cong. 12-13 (1997), [http://commdocs.house.gov/committees/judiciary/hju43667.000/hju43667\\_0.HTM](http://commdocs.house.gov/committees/judiciary/hju43667.000/hju43667_0.HTM) (statement of Rep. Sonny Bono).

<sup>162</sup> *Id.* Rep. F. Jim Sensenbrenner, Jr. took offense to the allegations made by Rep. Sonny Bono nearly beginning a squabble which Rep. Coble quashed. *Id.* at 13-14 (statement of Rep. Jim Sensenbrenner).

<sup>163</sup> Fairness in Music Licensing Act, H.R. 789, 105th Cong. § 202 (1997); Music Licensing in Restaurants and Retail and Other Establishments: Hearing on H.R. 789 before the Subcommittee on Courts and Intellectual Property, H. Committee on the Judiciary, 105th Cong. (1997), [http://commdocs.house.gov/committees/judiciary/hju43667.000/hju43667\\_0.HTM](http://commdocs.house.gov/committees/judiciary/hju43667.000/hju43667_0.HTM) (statement of Rep. Howard Coble). *See also* Robert B. Goss, *Stop the Music, I Want My Royalty — The Public Playing of Music in Restaurants and Businesses*, UNIV. OF HOUSTON L. CTR. 43 (2017).

<sup>164</sup> [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds160\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm)

<sup>165</sup> Scott M. Martin, *The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Protection*, 36 LOY. L.A. L. REV. 253 (2002).

Cared About."<sup>166</sup> As he pointed out,

[t]his myth overlooks that fact is that a wide coalition of copyright interests supported the CTEA, not just Disney. In addition to Disney, major vocal supporters of the Act included the Motion Picture Association of America, the American Society of Composers, Authors, and Publishers, the Rodgers and Hammerstein Organization, the George Gershwin estate, and others.

Indeed, most other accounts either acknowledge this point or further minimize Disney's involvement. In the New York Times, Stanford copyright expert Paul Goldstein asserted that "Disney was no more active in pushing for the extension than anyone else, but they made for a convenient villain."<sup>167</sup>

William Patry, who had been a counsel to the House Judiciary Committee during the early period when it was considering term extension, was even more direct in asserting that the major impetus for term extension was coming from the families of composers and their heirs. As he put it in 1997,

[t]he real impetus for term extension comes from a very small group: children and grandchildren of famous composers whose works are beginning to fall into the public domain, thereby threatening trust funds. These estates have considerable political and financial impact with ASCAP, the music performing rights collecting society. It is ASCAP and the other collecting society, BMI (in its traditional me-too role) who are pushing term extension, although their advocacy led to term extension being killed in the 104th Congress by those seeking to reform ASCAP and BMI's licensing practices for restaurants and bars. The estates of these famous composers frequently are music publishers as well, completing the royalty loop and eliminating any concerns about termination of transfers.<sup>168</sup>

One striking thing is the lack of a mention of Disney before 1998 – discussion of the impetus for term extension seems to mostly come down to composers.[expand]

At the same time, Disney's involvement shouldn't be entirely minimized. They did want term extension, and in 1998 spent at least some time lobbying for it. As mentioned above Disney was part of a coalition, and while it's

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<sup>166</sup> *Id.* at 320.

<sup>167</sup> <https://www.nytimes.com/2022/12/27/business/mickey-mouse-disney-public-domain.html>

<sup>168</sup> William Patry, The Failure of the American Copyright System: Protecting the Idle Rich, 72 Notre Dame L. Rev. 907, 932–33 (1997).

unfair to say the bill was passed mostly for Disney's benefit, they did support it.

However, there was barely anyone who produced IP who wasn't in support of term extension. Universal Studios was also lobbying in support of the bill, and no major studio opposed it. As the IP counsel to the Senate Judiciary Committee told me, "I wouldn't have recommended passage of term extension to Senator Hatch if I thought it was a special-interest bill for Disney."<sup>169</sup>

#### *E. The Resistance to Extension*

Dennis Karjala's op-eds and nonprofit look at Disney lobbying. How accurate is this, or was it selective focus to get a convenient enemy?

#### *F. Passing Extension*

In late 1998, the term extension bill finally reached the floor of Congress. At this point the bill had substantial momentum, and the debates would be limited on term extension.

On October 7, 1998, Congress discharged the Judiciary committee.<sup>170</sup> Sen. Leahy started things off by expressing her support and asserting the following:

In the global world of the next century, competition in the realm of intellectual property will reach a ferocity even more ruthless than it is today. Congress should equip American creators with a full measure of protection for their copyrighted works, else U.S. intellectual property owners are reduced in their reach and their effectiveness.<sup>171</sup>

Sen. Kennedy asserted his support and noted that copyright was an "important national priority" that represents the nation's historical belief that the "nation prospers when it advances knowledge, understanding and the arts."<sup>172</sup> Therefore, to stay on top of the market, Congress would need to extend the term.<sup>173</sup> Finally, Mr. Thurmond expressed his support of the passage noting how it helps the small business.<sup>174</sup> On October 27, 1998, the copyright term extension became Public Law No: 105-298 and labeled the Sonny Bono Copyright Term Extension Act.<sup>175</sup>

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<sup>169</sup> E-mail from Hon. Edward Damich to author.

<sup>170</sup> 144 CONG. REC. 11672 (1998).

<sup>171</sup> 144 CONG. REC. 11673 (1998).

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

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

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

<sup>175</sup> *S.505 - Sonny Bono Copyright Term Extension Act*, CONGRESS.GOV, <https://www.congress.gov/bill/105th-congress/senate-bill/505?q=%7B%22search%22%3A%5B%22sonny+bono%22%5D%7D&s=8&r=3> (last visited Mar. 31, 2023).



*G. The Litigation – Eldred v. Ashcroft*

It seems significant that so much of the Eldred litigation – including but not limited to the dissent by Justice Breyer – seems premised on the idea that term extension was mainly for Disney’s benefit. [to expand, although this isn’t meant to be a paper on Eldred]

## IV. THE STORIES WE TELL: LEGISLATIVE NARRATIVE AND HISTORY

For advocates of limiting copyright, term extension “reminded the growing reform movement of the power of large corporations like Disney to influence copyright law.”<sup>176</sup> This “brought many new converts to the copyright reform movement.”<sup>177</sup> It’s worth looking back at what actually motivated the telling of this story, though.

*A. The Public Evolution of Disney*

The fight over copyright term extension was happening just as Disney’s place in American culture was shifting, and understanding why Disney was such a compelling villain to opponents of term extension requires an exploration of this.

To those in academia and on the left, it’s hardly secret that Disney is closely associated with “a set of values that is, politically speaking, simplistically rightist – moderately conservative to those who barely tolerate Disney, cryptofascist for others who perceive his work as insidious, even dangerous.”<sup>178</sup> This view is of substantial vintage; critic James Agee wrote in 1942 that “Disney’s famous cuteness, however richly it may mirror national infantilism, is hard on my stomach.”<sup>179</sup> In 1965 Max Rafferty, California’s Superintendent of Public Instruction, wrote that Disney conjured “sanctuaries of decency,” leading to the tart rejoinder that Disney “debased of the traditional literature of childhood...manipulating and vulgarizing everything for his own ends.”<sup>180</sup> Put simply, Disney was “the century’s most important figure in bourgeois popular culture.”<sup>181</sup> To those of a certain ideological stripe, this was a harsh charge indeed, but even then, “attacking Disney [was]

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<sup>176</sup> PETER DECHERNY, HOLLYWOOD’S COPYRIGHT WARS, FROM EDISON TO THE INTERNET 239 (2012).

<sup>177</sup> *Id.*

<sup>178</sup> DOUGLAS BRODE, FROM WALT TO WOODSTOCK xi (2004). Brode makes the case that Walt Disney the man was substantially more radical than is generally thought, thus the subtitle “How Disney Created the Counterculture.” However, for our purposes here the general perception of Disney is more important.

<sup>179</sup> Review of *Saludos Amigos*, *The Nation*.

<sup>180</sup> <https://www.hbook.com/story/walt-disney-accused-vhe>

<sup>181</sup> David Kunzle, Introduction to the English Edition, *How to Read Donald Duck: Imperialist Ideology in the Disney Comic* (4<sup>th</sup> Ed. 2018) (Originally published by International General, 1975).

no novelty.”<sup>182</sup> By 1999 Disney was “synonymous with a certain conservative, patriarchal, heterosexual ideology which is loosely associated with American cultural imperialism.”<sup>183</sup>

By 1998 this was all old hat, and the disapproval of Marxists and Deconstructionists was hardly a problem for Disney in American popular culture. But Disney itself was changing in ways which would affect its image. During Walt Disney’s life and in the 18 years after his death in 1966, Disney “had always held itself aloof from Hollywood.”<sup>184</sup> This changed with the arrival of a new management team of Michael Eisner, Frank Wells, and Jeffrey Katzenberg in 1984, and under their leadership (although by 1998 only Eisner was left) Disney would have massive success – and growth. Disney not only had massive success at the box office, they invested heavily in global projects like the Euro Disney theme park.<sup>185</sup> In 1996 Disney acquired the Capital Cities/ABC, and thus now owned not just the ABC broadcast network but also cable channels like ESPN.<sup>186</sup> Disney was now much more than a company that made family movies and related concerns; were now a colossus. Meanwhile, the acrimonious (and litigated) departures of senior executives “made public the colossal wages” they were being paid and “tainted the Disney image” in the mid-1990s.<sup>187</sup>

In this background occurred one of Disney’s most significant copyright skirmishes of the 20<sup>th</sup> century, the fight over the *Air Pirates Funnies*. Published in 1971, this short-lived underground comic featured “Mickey Rdent” engaged in a variety of non-wholesome shenanigans.<sup>188</sup> The books were an intentional provocation of Disney, and Disney took the bait, ultimately getting a finding that they were infringing of Disney’s copyrights.<sup>189</sup> On the one hand, advocates for parody felt that the *Air Pirates* set back privacy law 20 years by pushing too far into the obscene.<sup>190</sup> However, the matter further cemented Disney’s image of being overly aggressive in policing its intellectual property and insufficiently respectful of free speech in the eyes of the counterculture.<sup>191</sup>

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<sup>182</sup> *Id.* At 95.

<sup>183</sup> ELEANOR BYRNE & MARTIN MCQUILLAN, *DECONSTRUCTING DISNEY* 1-2 (1999).

<sup>184</sup> ALEXANDRE BOHAS, *THE POLITICAL ECONOMY OF DISNEY* 31(2016), *quoting* JAMES STEWART, *DISNEY WAR* 22 (2006)

<sup>185</sup> Bohas, *Id.* at 49.

<sup>186</sup> *Id.* at 65.

<sup>187</sup> *Id.* at 126; *In re Walt Disney Derivative Litigation*, 907 A 2d 693 (Del. 2005) (Finding that Disney’s directors had not violated their fiduciary duties in firing Michael Ovitz without cause, but remarking that “there are many aspects of defendants’ conduct that fell significantly short of the best practices of ideal corporate governance.”).

<sup>188</sup> BOB LEVINE, *THE PIRATES AND THE MOUSE* 64 (2003)

<sup>189</sup> *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978).

<sup>190</sup> Levine, *Id.* at 226.

<sup>191</sup> *Id.* at 241.

With Disney widely disliked on the left, and increasingly seen as a giant conglomerate far removed from the animation studio it started as, another thread would begin to develop, which would help make them the perfect villain in 1998, and which has only continued to grow – hostility from the right.

Although rarely on the surface, the Disney animated films of the Eisner era frequently contained subversive messages and stories.<sup>192</sup> However, it doesn't seem that these caused much reaction as they mostly remained sub rosa. Instead, objections were more focused on matters like Disney's extension of benefits to same-sex couples, the annual (but unofficial) "Gay Days" festival at Disney World, and the ABC sitcom *Ellen* featuring an openly gay lead character.<sup>193</sup> In 1997 the Southern Baptist Convention formally voted to boycott Disney on these grounds.<sup>194</sup> In 1998 Regnery published *Disney: The Mouse Betrayed*, arguing that Disney was a hotbed of pedophilia, and that the new Disney had little connection to the old one.<sup>195</sup>

In this context it's worth considering the opposition of Phyllis Schlafly and her organization, Eagle Forum, to copyright term extension. Eagle Forum was an outgrowth of the Stop ERA group, which had been organized to fight the Equal Rights Amendment in 1972.<sup>196</sup> Lawrence Lessig states that Phyllis Schlafly and her organization, Eagle Forum, "had been an opponent of the CTEA from the very beginning," since she viewed it "as a sellout by Congress."<sup>197</sup> From his own account Lessig tried to gather "the widest array of credible critics" of copyright term extension to oppose it.<sup>198</sup> In retrospect though, it seems hard to avoid thinking that Eagle Forum's opposition to term extension and framing of it as coming from Disney was about more than just based on copyright policy. Indeed, in the same message where she asserted that Disney was the "chief special interest promoting" copyright term extension, Schlafly noted *The Mouse Betrayed* as showing how Disney "is the enemy of all the family values which Republicans cherish."<sup>199</sup>

Over time hostility between the conservative element in America and Disney has only grown, and the myth that term extension was mainly for Disney's benefit was an important part in telling a story that the new Disney

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<sup>192</sup> <https://www.smithsonianmag.com/arts-culture/little-mermaid-was-way-more-subversive-you-realized-180973464/>

<sup>193</sup> <https://www.washingtonpost.com/archive/politics/1997/06/19/baptists-vote-to-boycott-disney-fare/41dcfec7-d905-41ea-ac7a-178b18107ed9/>

<sup>194</sup> *Id.*

<sup>195</sup> Peter Schweizer and Rochelle Schweizer, *Disney: The Mouse Betrayed: Greed, Corruption, and Children at Risk* (1998)

<sup>196</sup> [https://en.wikipedia.org/wiki/Eagle\\_Forum](https://en.wikipedia.org/wiki/Eagle_Forum)

<sup>197</sup> LAWRENCE LESSIG, *FREE CULTURE* 231 (2004).

<sup>198</sup> *Id.*

<sup>199</sup> <https://eagleforum.org/column/1998/nov98/98-11-25.html>

was a bad actor.<sup>200</sup>

### B. Mickey Mouse as Political Character

Disney and Mickey Mouse are some of the key characters in how we talk about copyright policy, and this issue is a window into understanding that.<sup>201</sup>

### C. Follow the Money?

The story has been made that Disney made a major push of both lobbying and donations to get term extension passed. But is that really true? Actual dollar amounts asserted as being given/spent seem pretty low.

## Disney's Huge Lobbying Efforts

Since 1997, Disney has spent \$87.6 million on lobbying -- mostly to influence copyright legislation

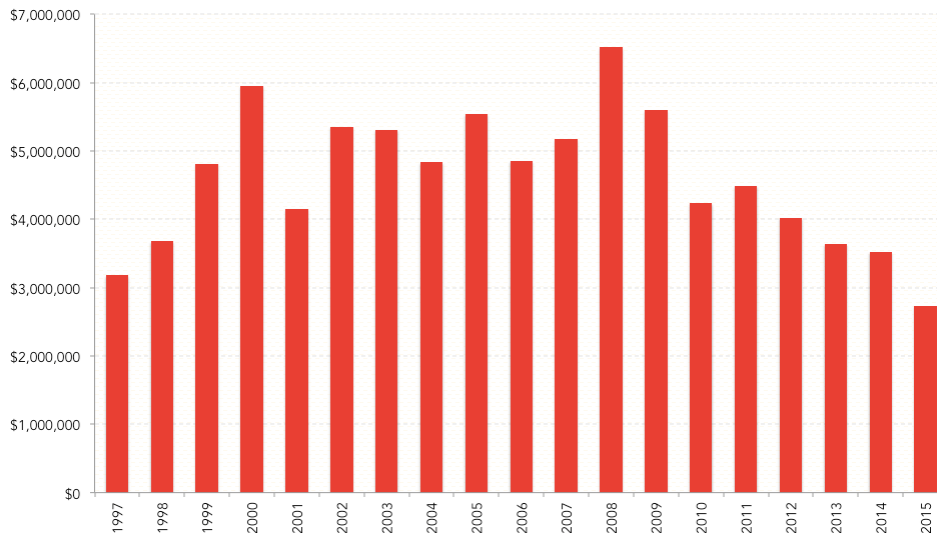


Figure 1 - "Disney's Huge Lobbying Efforts" from Priceonomics

Chart showing Disney lobbying expenses 1997-2015.<sup>202</sup> Doesn't look like 1997 or 1998 were an outlier, contrary to what you'd expect if there was a huge lobbying push.

Updating this chart to 2022 just confirms that 1998 wasn't an especially notable year.

<sup>200</sup> <https://www.forbes.com/forbes/2003/0331/027.html> (term extension was "pushed primarily" by Disney.

<sup>201</sup>, Mihailis Diamantis, *The Law's Missing Account of Corporate Character*, 17 GEO. J.L. & PUB. POL'Y 865 (2019)

<sup>202</sup> <https://priceonomics.com/how-mickey-mouse-evades-the-public-domain/>

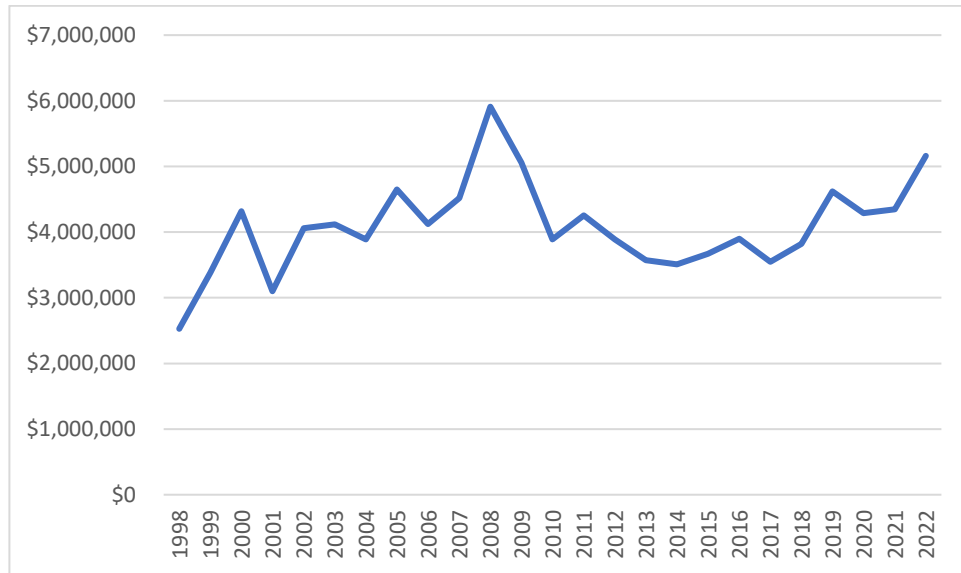
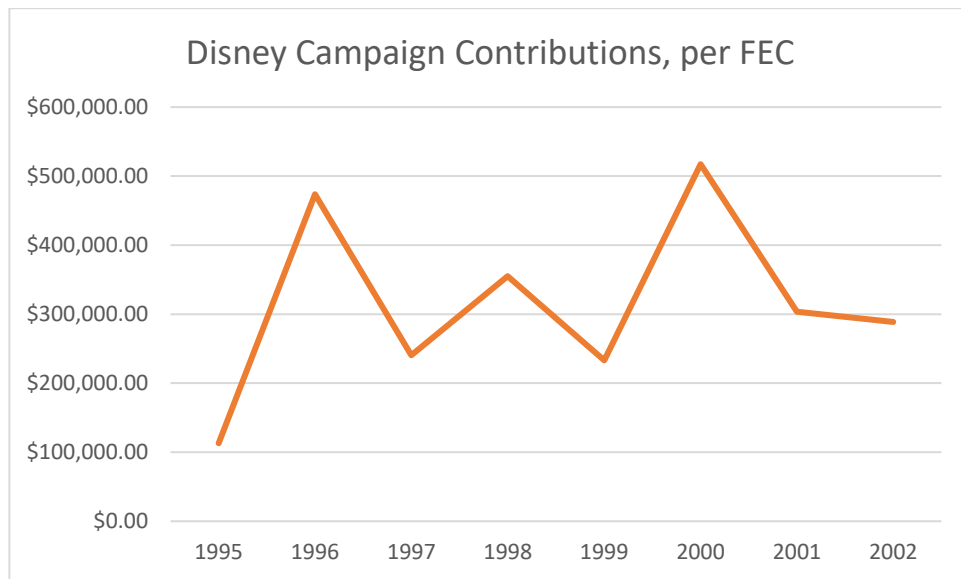
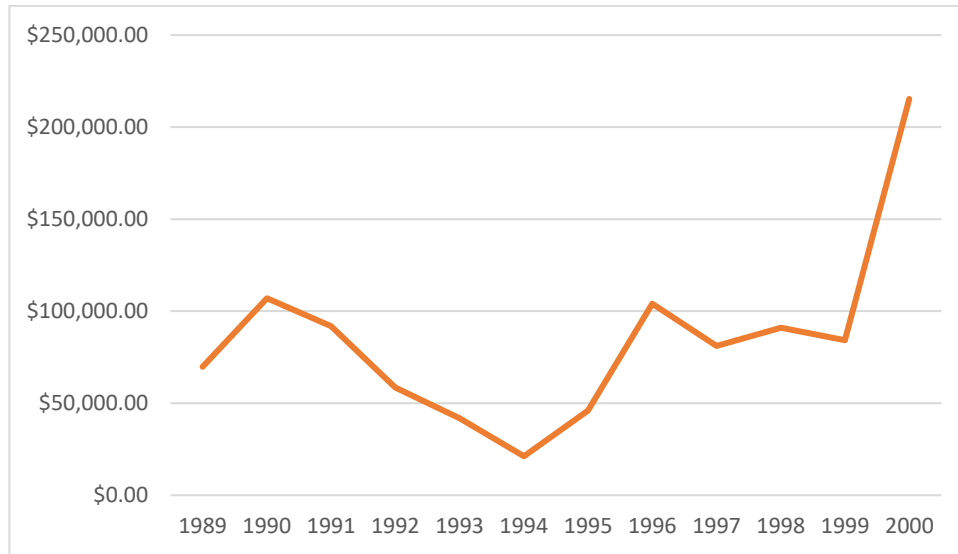


Figure 2 - Disney Lobbying Expenses from Opensecrets



Campaign contributions look similar (data ends in 2002 because of campaign finance laws stopping big corporate gifts then).

Data on Disney transfers for campaign purposes tells a similar story. Transfers to political candidates and groups weren't especially large in 1998.



**Figure 3 - Disney transfers from Opensecrets**

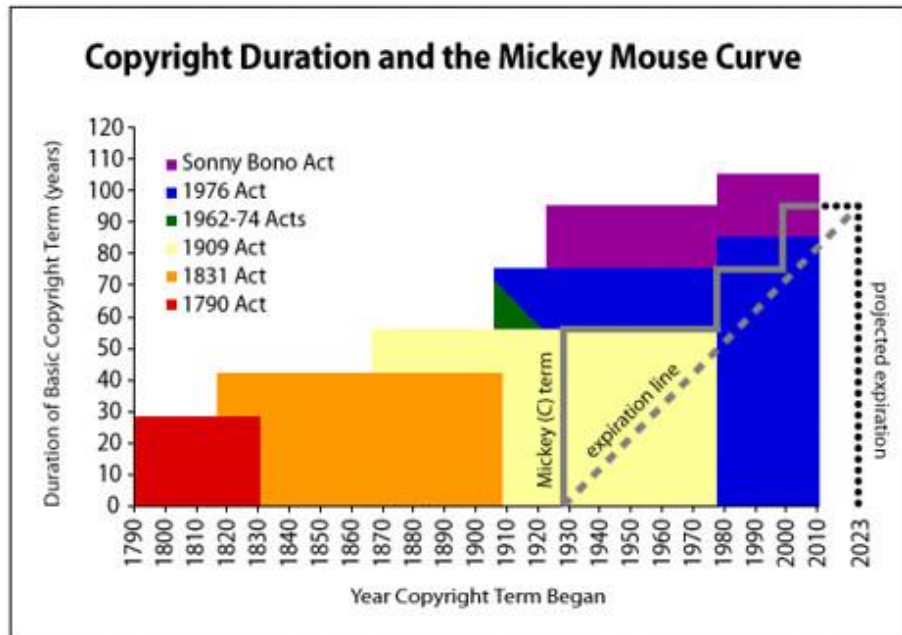
The main takeaway is how big spending was in 2000 – well after the term extension was secured.

#### *D. The Mickey Mouse Curve?*

Those who assert the CTEA was for Disney’s benefit frequently point to the “Mickey Mouse Curve,” whereby “every time Mickey Mouse started to get near the public domain, a purely coincidental thing happened where Congress would (totally unrelatedly) extend copyrights.”<sup>203</sup> This is illustrated with a chart, originally from Tom W. Bell.<sup>204</sup>

<sup>203</sup> <https://www.techdirt.com/2023/04/03/john-oliver-pokes-disney-with-a-big-stick-starts-using-1928-mickey-mouse-a-year-early/>

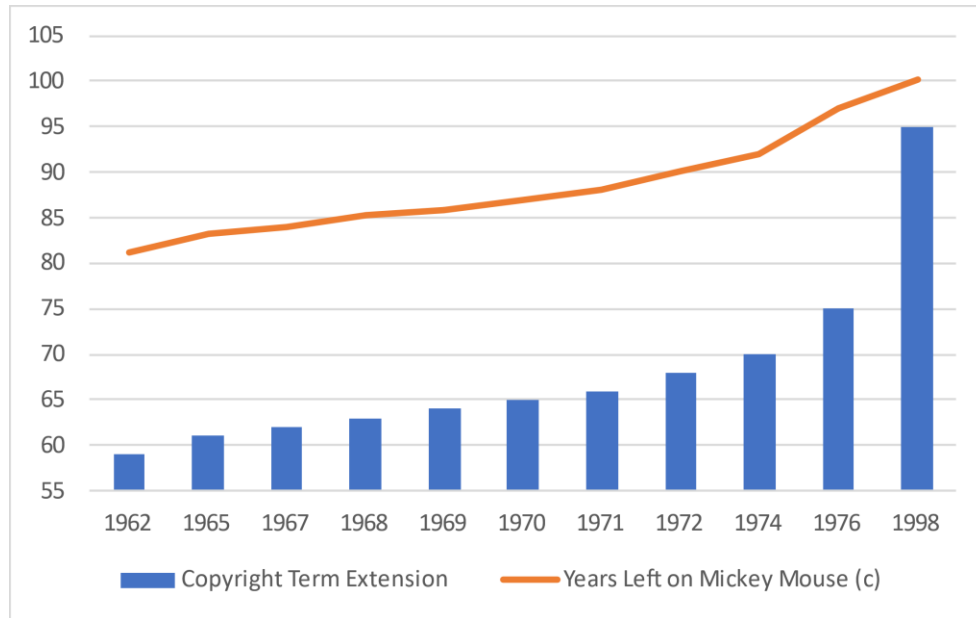
<sup>204</sup> <https://techliberation.com/2009/08/06/copyright-duration-and-the-mickey-mouse-curve/> (image no longer at this link, taken from previous footnote)



**Figure 4 - Mickey Mouse Curve: Original Version**

Except...this ignores what actually happened 1962 to 1976. Copyright duration for works in their renewal term and about to expire was being repeatedly extended during this period. Steamboat Willie (and thus Mickey Mouse) de facto had its copyright renewed Dec. 22, 1955, and thus was in a renewal term set to expire in 1984.<sup>205</sup> With the extension of three years in 1962 the expiration was moved to 1987. Hardly the stuff of urgency, and as mentioned the term would be extended nine more times until the new act was finally passed in 1976. The actual chart shows a diagonal set of steps whereby the term of protection for Steamboat Willie never came within two decades of expiration until its copyright term was set as ending in 2004 in 1976.

<sup>205</sup> <https://babel.hathitrust.org/cgi/pt?id=mdp.39015084451130&view=page&seq=373>



**Figure 5 - Copyright Term Extensions 1962-1998**

The above chart shows the effective new term of copyright, and the line's distance from the term shows how many years were left for the copyright in Steamboat Willie (and Mickey Mouse as expressed in that cartoon. At each extension (save for 1998) Mickey Mouse was roughly 22 years from the public domain, hardly a figure which would inspire fear even if Disney was monomaniacally obsessed with keeping Steamboat Willie protected by copyright.

It should be noted that technically the interim extensions only applied to works about to expire, which Steamboat Willie was not yet about to do. However, the extensions were occurring with the clear expectation that copyright would be extended at least that long, which it was, and reflected where the real anxieties about the expiration of works were – and were not. Mickey Mouse was in no danger of entering the public domain in the 1980s.

#### *E. The Mouse that Didn't Roar*

Steamboat Willie is about to become public domain. Everyone predicted a huge fight over another copyright term extension. Instead there was no effort to extend copyright. Further proof the focus on Disney was misallocated, although the backlash surely played a role as well. Point isn't that Disney wouldn't want a copyright term extension all other things being equal, but rather that it isn't as important to them as people tend to think. In any case trademark law, especially dilution, picks up much of the slack, then as now.

#### V. CONCLUSION

On April 26, 2023, the Walt Disney Company sued Florida Governor Ron



DeSantis, arguing that he had engaged in “a targeted campaign of government retaliation.”<sup>206</sup> The actions which led to this lawsuit were widely assumed to be aimed at currying favor among conservative Republicans in the presidential primary for the 2024 election. While these seems disconnected from the term extension fight a quarter of a century earlier, the fight over term extension ended up being part of a major shift in the relationship of the Republican party to Disney, and to American mass culture generally.

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<sup>206</sup> <https://www.nytimes.com/2023/04/26/business/disney-desantis-board-florida.html>