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## NOTE

# THE EFFECT OF THE 1886 BERNE CONVENTION ON THE U.S. COPYRIGHT SYSTEM'S TREATMENT OF MORAL RIGHTS AND COPYRIGHT TERM, AND WHERE THAT LEAVES US TODAY

*Samuel Jacobs\**

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## ABSTRACT

*The 1886 Berne Convention was the most influential copyright related treaty for over a century, and provided important minimum substantive protections for authors. Key provisions included the establishment of the principle of National Treatment, the abolishment of formalities in order to receive copyright protection, a required copyright term of life of the author plus fifty years, and most offensive to the U.S. copyright system, the mandate that signatories provide authors non-economic moral rights. Despite the international importance and widespread acceptance of the Berne Convention, the U.S. did not join the Convention for over one hundred years, making it one of the last developed countries in the world to do so. Although the U.S. finally signed onto Berne and passed the Berne Convention Implementation Act in 1988, it was universally known that the U.S.' implementing legislation was a minimalist approach to ratifying the treaty. Due to this watered down approach, Berne has played both a practical, and merely rhetorical, role in shaping the U.S.' copyright system as it stands today. This note will explore the Berne Convention's rhetorical role in shaping the U.S. copyright system's treatment of moral rights, and the Convention's practical role in shaping the treatment of copyright term in the U.S.*

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\* J.D., University of Michigan, December 2016 (Expected); B.A., Philosophy, Politics, and Law, University of Southern California, 2014. Thank you to my family and friends for their support. I would also like to give a special thank you to my Music Industry professor from University of Southern California, Paul Young, for inspiring me to be an advocate for the rights of content creators.

## INTRODUCTION

In 1886, in an effort to address the proliferation of international literary piracy, ten countries agreed in Berne, Switzerland to sign a unifying multilateral agreement regarding copyright protection.<sup>1</sup> This agreement, known as the Berne Convention for the Protection of Literary and Artistic Works (the “Berne Convention” or “Convention” or “Berne”), was the most influential copyright treaty for over a century,<sup>2</sup> and provided important minimum substantive protections for authors. Key provisions included Article 5(3), which established the principle of *National Treatment*,<sup>3</sup> Article 5(2), which required that the enjoyment of copyright “shall not be subject to any formality,” Article 7(1), which established a copyright term of life of the author plus fifty years, and most offensive to the U.S. copyright system, Article 6*bis*, which provided authors with non-economic *moral rights*.<sup>4,5</sup>

While Berne’s signatories included the greatest colonial powers, and thus encompassed a significant part of the world, the U.S. did not join the Convention for *over one hundred years*.<sup>6</sup> In fact, seventy-nine nations signed on before the U.S. did in 1988, making the U.S. one of the last developed countries in the world to accede to Berne.<sup>7</sup> Some of the reasons the U.S. refused to sign on for so long included its disinterest in providing foreign works with a uniformly high substantive standard of protection (as required by *National Treatment*), its reluctance to abandon the formalities required at the time by U.S. copyright law (such as publication with notice), its desire to avoid extending copyright term to life plus fifty, and its steadfast denial of moral rights in the face of the U.S. copyright system’s emphasis on eco-

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1. JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 34 (3d ed. 2010). These countries were Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, the United Kingdom, and Tunisia. The United States and Japan attended as observers. Since its inception, the treaty has had two additions and five revisions, the latest in Paris in 1971. As of the writing of this note, 172 nations have acceded to the Berne Convention.

2. Arguably, the 1994 Agreement on Trade Related Aspects of Intellectual Property (“TRIPS”) is now more influential, though it covers all forms of intellectual property, unlike Berne.

3. Often termed the “fundamental principle of the Berne Convention” due to its unifying and nondiscriminatory effect, *National Treatment* requires that signatories grant authors who are nationals of other Berne countries the same protections they accord to their own nationals. Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 16-17 (1988).

4. Article 6*bis* provided authors with the right to claim paternity of their work, termed the “attribution right,” and the right to their work’s “integrity.” COHEN, *supra* note 1, at 392-93.

5. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Paris, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221, available at [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698#P127\\_22000](http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P127_22000).

6. COHEN, *supra* note 1, at 35.

7. See GENELLE BELMAS & WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 302 (2014).

conomic rights and origins in utilitarian theory.<sup>8</sup> However, these sentiments gave way to the growing importance of international protection of intellectual property rights in the 1980s, as many developed countries' economies, including that of the United States, began to predominantly center around the dissemination of intellectual property.<sup>9</sup> The U.S. finally signed onto Berne and passed the Berne Convention Implementation Act (the "BCIA") in 1988,<sup>10</sup> making the U.S. a party to the Berne Convention in 1989.<sup>11</sup> However, the BCIA is universally known as a minimalist approach to ratifying the treaty, as Congress paid heed to industry groups' apprehension about adopting European copyright concepts and public interest groups' concern with the impact of higher levels of copyright protection on public access to copyrighted works.<sup>12</sup>

Due to this watered down implementing legislation, Berne has played both a *practical*, and merely *rhetorical*, role in shaping the U.S.' copyright system as it stands today. This note will explore the Berne Convention's *rhetorical* role in shaping the U.S. copyright system's treatment of moral rights, and the Convention's *practical* role in shaping the treatment of copyright term in the U.S. Part I will discuss the Berne Convention's moral rights provisions, the clash between the theoretical foundations of the U.S. copyright system and the copyright systems of Berne's Continental European drafters, the U.S.' efforts to implement the Berne Convention's moral rights provisions, and the inadequacy of those efforts. Part I will discuss the history of copyright term's growth in the U.S., how the Berne Convention's copyright term provisions influenced this history of growth, and the motives behind U.S. copyright term's continued growth beyond Berne's term of life plus fifty. Lastly, Parts I and II will conclude with predictions for the future of each subject.

## I. THE EFFECT OF THE BERNE CONVENTION ON MORAL RIGHTS IN THE U.S.

### A. *The Berne Convention's Moral Rights Provision*

The minimalist approach taken by Congress when drafting the BCIA was most apparent in the realm of moral rights. One of the primary provisions of the Berne Convention, Article *6bis* provided authors with non-economic moral rights.<sup>13</sup> Specifically, Article *6bis*(1) established that "independently of the author's economic rights, and even after the transfer

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8. COHEN, *supra* note 1, at 35.

9. *See id.*

10. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

11. COHEN, *supra* note 1, at 35.

12. *Id.*

13. Berne Convention, *supra* note 5, at art. *6bis*.

of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”<sup>14</sup> This provision thus *required* all Berne signatories to provide authors with both the right to claim paternity of their works (known in the U.S. as the right of attribution) and the right to their works’ integrity.

To provide context for the significance of these moral rights, the right of attribution is understood to encompass the author’s right to have a work published anonymously or under a pseudonym, to prevent false attribution, and the right to prevent the author’s name from being applied to the work of another person.<sup>15</sup> The right of integrity encompasses the author’s right to prevent uses or modifications of his work that would be injurious to his honor, reputation, or other “intellectual interests” as an artist, which has been interpreted by the French Court of Cassation to even protect against the colorization of a black and white film without the approval of the deceased producer’s heirs.<sup>16</sup> Article 6*bis*(2) of Berne provided that these rights must last at least until the expiration of the author’s economic rights.<sup>17</sup>

The presence of Article 6*bis* was one of the primary reasons why the U.S. refused to accede to Berne for almost a century, as moral rights were, and continue to be, antithetical to the theory of copyright upon which the U.S. copyright system was built. The U.S. copyright system is based on the *utilitarian* theory that copyright law exists purely “to provide a marketable right for the creators and distributors of copyrighted works, which in turn creates an incentive for production and dissemination.”<sup>18</sup> Article I, § 8,

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14. *Id.*

15. Natalie C. Suhl, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203, 1212 (2002); *see also* Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297, 298 (2003) (“Rights of paternity relate to the artist’s right to identify himself with his works and, conversely, to disassociate himself with works that have been significantly changed by others or that never originated from him.”).

16. Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 17 (1994) (citing Judgment of May 28, 1991, Cass. Civ. 1re, 149 r.i.d.a. 197 (1991) (*Asphalt Jungle*)). Examples of statutory rights to integrity provided in European countries include Article 14 of the German Copyright Statute, which provides that “[t]he author shall have the right to prohibit any distortion or any other mutilation of his work which would prejudice his lawful intellectual or personal interests in the work,” and Article 6 of the French Copyright Statute, which provides that “[t]he author shall enjoy . . . respect for his name, his authorship, and his work.” Netanel, *supra* note 15, at 48 n. 189.

17. However, countries whose legislation, at the moment of their ratification of Berne, did not provide for the protection after the death of the author of all the moral rights set out in Article 6*bis* were permitted to provide that some of these rights may, after the author’s death, cease to be maintained. Berne Convention, *supra* note 5, at art. 6*bis*(2).

18. COHEN, *supra* note 1, at 7.

clause 8 of the U.S. Constitution (the “Intellectual Property Clause” or “Clause”) reflects the Framers’ approval of this utilitarian rationale, as the Clause provides that “Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Investors the exclusive Right to their respective Writings and Discoveries.”<sup>19</sup> By granting authors an alienable “limited monopoly” in their creative works, the federal government promotes “progress” in knowledge and learning by *incentivizing* the creation of works. This is accomplished by allowing authors to charge the public for access to their works for a limited time, while the public gets to reap the benefits of these advances in “science and useful arts,” which eventually can be utilized free of charge once the works fall into the public domain. Therefore, U.S. copyright law can be understood as a tool for advancement of the public interest, rather than a form of guaranteed right arising out of creation.<sup>20</sup>

On the other hand, the copyright systems of Continental European countries—the powerhouse nations that determined the contents of the Berne Convention—are based on the notion that an author’s *natural right* in his creation forms the principal justification for copyright protection (the “Continental doctrine” or “Continental *natural right* theory”).<sup>21</sup> Continental countries thus view copyright as not simply protecting a *commodity*, but as protecting the author’s individual character and spirit as expressed in his work.<sup>22</sup> Accordingly, the Continental doctrine regards literary and artistic works as inalienable extensions of the author’s *personality*, and therefore market transfers and waivers of the author’s rights in his *innately personal* works are restricted to protect the author’s personal interest in determining whether, when, by whom, and in what manner his works are presented to the

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19. *Id.*; U.S. CONST. art. I, § 8, cl. 8.

20. Suhl, *supra* note 15, at 1214. It is worth noting that there is a subset of theorists who posit that the U.S. copyright system’s theoretical origins contain strands of the idea that authors have certain natural rights in their works. See COHEN, *supra* note 1, at 11. However, even these theorists admit that such strands of natural rights-centric ideology are unlike Continental Europe’s conception of there being a sacred bond of personality between authors and their works. *Id.* Rather, the strands of which these theorists speak are rooted in John Locke’s labor theory, which proclaims that property exists because of the labor that has gone into producing or maintaining it, though a right in such property exists only when there is enough left in the commons for others. *Id.* at 13; see also JOHN LOCKE, TWO TREATISES ON GOVERNMENT Book II, ch. V (1690) (“every Man has a *Property* in his own *Person*. . . The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. . . [I]t hath by this *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being unquestionable Property of the Labourer, no Man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.”). Despite this fringe conception, there should be no doubt that, in the U.S., the utilitarian justification for copyright protection predominates, as evidenced by the constitutional grant of authority in Article I, § 8, clause 8. COHEN, *supra* note 1, at 12.

21. COHEN, *supra* note 1, at 10.

22. Netanel, *supra* note 16, at 7.

public.<sup>23</sup> These restrictions on alienability are manifested in the author's *moral rights*, which empower the author—even after granting to another the exclusive right to market his work—to block publication, determine how authorship is attributed, and prevent material changes in, or uses of, the work that are repugnant to the author's artistic conception.<sup>24</sup>

Given this focus on authors' inalienable rights to the treatment of their works, even post-assignment, the Continental *natural right* theory of copyright is clearly in conflict with the U.S. *utilitarian* theory of copyright. Essential to the ability of the government to incentivize authors to create and thereby promote progress is authors' capability to freely transfer and assign their rights in their creations. Heavily restricted rights, despite assignment, would result in lower demand for creative works due to the limited ability to put them to use, which in turn would result in lower incentives for authors to create, ultimately harming the public good. Yet these kinds of restrictions are essential to the Continental doctrine's accomplishment of its goal in offering copyright protection in the first place—protecting the author's personhood inextricably intertwined with his work.

#### B. *The U.S.' Approach to Moral Rights in the BCIA and Visual Artists Rights Act*

Perhaps unsurprisingly given this fundamental theoretical conflict, the BCIA did not provide for *any* moral rights, despite the explicit moral rights provision in Berne. Instead, § 2(3) of the BCIA stated that *existing* U.S. law was sufficient to satisfy U.S. obligations under Berne.<sup>25</sup> Specifically, the legislative history stated that “this existing U.S. law includes various provisions of the Copyright Act and the Lanham Act, various state statutes, and common law principles such as libel, defamation, misrepresentation, and unfair competition.”<sup>26</sup> This was quite a curious assertion, given that one of the principal reasons the U.S. resisted signing onto Berne was that our system implicitly and explicitly *did not* provide for moral rights. Tellingly, while many U.S. litigants have attempted to rely on these aforementioned preexisting legal principles to obtain the same, or similar, protections offered by Berne's moral rights provision, few have succeeded.<sup>27</sup>

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23. *Id.* at 2.

24. *Id.*

25. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 2(3), 102 Stat. 2853 (1988) (“The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.”).

26. S. Rep. No. 352, 100th Cong., 2d Sess. 9-10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3706, 3714-15.

27. *See, e.g., Choe v. Fordham Univ. Sch. of Law*, 920 F. Supp. 44, 48 (S.D.N.Y. 1995), *aff'd*, 81 F.3d 319 (2d Cir. 1996) (rejecting the plaintiff's attempt to assert the right of integrity through § 43(a) of the Lanham Act because he did not provide sufficient evidence to demon-

The passage of the Visual Artists Rights Act (“VARA”)—codified in 17 U.S.C. § 106A—two years after acceding to Berne was arguably one instance in which the U.S. tried to live up to its commitments under Berne and its lofty assertion in § 2(3) of the BCIA. VARA provides a limited set of unique moral rights protections for authors of a “work of visual art,” including the right of attribution, the right to prevent any intentional distortion, mutilation, or other modification of the work that would be “prejudicial to his or her honor or reputation,” and in the case of works of art of “recognized stature,” the right to prevent destruction.<sup>28</sup> However, VARA has proven to be an insufficient effort to satisfy Berne’s moral rights mandate.

First, VARA applies only to authors of “works of visual art,” and the U.S. Copyright Act’s definition of a “work of visual art” requires the work to be a “painting, drawing, print, sculpture” or a “still photographic image produced for exhibition purposes only” that exists “in a single copy” or “in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.”<sup>29</sup> Furthermore, artists who are commissioned to create a work are likely to be excluded from VARA’s protections, as their

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strate that the published version of his Fordham International Law Journal comment “departed so substantially from the original work that [the author] may be said not to be its author.”); *Lish v. Harper’s Magazine Found*, 807 F. Supp. 1090, 1107 (S.D.N.Y. 1992) (rejecting the plaintiff’s attempt to assert the right of integrity through § 43(a) of the Lanham Act because he did not provide sufficient evidence to demonstrate the defendant magazine publisher’s version of the plaintiff’s letter, which removed approximately half of its contents, “substantially distorted the original.”); *Dastar v. Twentieth Century Fox*, 539 U.S. 23, 37 (2003) (rejecting the plaintiff’s attempt to assert the right of attribution through § 43(a) of the Lanham Act because the phrase “origin of goods” found in the Lanham Act’s prohibition against false designations “refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods.”); *Zyla v. Wadsworth*, 360 F.3d 243 (1st Cir. 2004) (rejecting the plaintiff’s attempt to assert the right of attribution through § 43(a) of the Lanham Act under the same reasoning as expressed in *Dastar*, and rejecting the plaintiff’s accompanying copyright, breach of contract, breach of implied covenant of good faith and fair dealing, tortious interference, and fraudulent inducement claims); *General Universal Sys. v. Lee*, 379 F.3d 131 (5th Cir. 2004) (rejecting the plaintiff’s attempt to assert the right of attribution through § 43(a) of the Lanham Act under the same reasoning as expressed in *Dastar*, and rejecting the plaintiff’s accompanying copyright and breach of contract claims). *But see Gilliam v. Am. Broad. Companies, Inc.*, 538 F.2d 14 (2d Cir. 1976) (holding that ABC violated the plaintiff’s right of integrity through § 43(a) of the Lanham Act by broadcasting an unauthorized, highly edited version of Monty Python which substantially changed the skits, and allowed the public to identify the new skits as Monty Python’s original creation); *Benson v. Paul Winley Record Sales Corp.*, 452 F. Supp. 516 (S.D.N.Y. 1978) (holding that the defendant violated the plaintiff’s right of integrity through § 43(a) of the Lanham Act by remixing the plaintiff’s album, where the new version included sexually explicit lyrics and an erotically renamed cover). While *Gilliam* and its progeny represent an expansive reading of § 43(a), asserting that the Lanham Act’s purpose is “not only to protect the public and artist from misrepresentations, but also to enforce the author’s ‘personal right’ to reject public viewings of his or her work in a mutilated or distorted form,” the majority of recent cases regarding this issue reject this interpretation. *See Suhl, supra* note 15, at 1225.

28. COHEN, *supra* note 1, at 398; 17 U.S.C. § 106A (1990).

29. 17 U.S.C. § 101 (2010).



works are likely to be deemed works made for hire, which are not covered by VARA.<sup>30</sup> Therefore, VARA not only fails to protect a significant amount of copyrighted works (posters, maps, technical drawings, diagrams, models, applied art, motion pictures, books, magazines, newspapers, periodicals, data bases, electronic publications, merchandising items, and all works made for hire, to name a few), but it also places onerous requirements on the works to which it offers protection.<sup>31</sup>

Second, in addition to, and likely because of, the statute's extraordinarily narrow application textually, U.S. courts have been similarly stingy in applying VARA to artists seeking its protections. For example, in *Phillips v. Pembroke Real Estate*, the First Circuit interpreted VARA § 106A(c)(2)'s public presentation exception, which states that "[t]he modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification. . . unless the modification is caused by gross negligence," as meaning that VARA does not apply to art where the location of the work is an integral element of the work ("site-specific art").<sup>32</sup> Therefore, the sculptor seeking a preliminary injunction to prevent the manager of a public sculpture park from altering the location of the sculptor's works—which was integral to the pieces of art, themselves—was left with no recourse.<sup>33</sup> Given that VARA has most often been used by artists whose works were originally designed for installation in public locations, *Phillips*, to the extent that it is followed, deals a heavy blow to those seeking protection under the already wafer-thin statute.<sup>34</sup>

Another example of courts applying VARA narrowly is *Lilley v. Stout*. There, the plaintiff, a photographer, and the defendant, a painter, had agreed to a collaboration in which the plaintiff would photograph certain scenes that the defendant would use "as studies for paintings [she] planned to create."<sup>35</sup> The defendant ultimately painted one of the plaintiff's photographs, but also included six of the plaintiff's original photographs, unmodified, in her work of art: a binder of paintings and photographs.<sup>36</sup> The plaintiff asserted that the

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30. *Id.* ("A work of visual art does not include . . . any work made for hire.").

31. COHEN, *supra* note 1, at 398-99.

32. Elizabeth Herbst Schierman, *Moral Rights Under Federal Law*, 51 *ADVOCATE* 23, 24 (2008) (citing *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006)).

33. *Phillips v. Pembroke*, 459 F.3d at 143. Notably, the First Circuit, itself, declared in the first paragraph of its *Phillips* opinion that "[t]o remove a work of site-specific art from its original site is to destroy it." *Id.* at 129. Despite this acknowledgement, the Court ultimately held that VARA "does not apply to site-specific art at all." *Id.* Thus, the Court permitted the defendant to not only remove the artist's works from their location, but also, in the Court's own words, to destroy them.

34. *Id.*; but see *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 306-07 (7th Cir. 2011) (casting doubt on the accuracy of *Phillips*' site-specific rule).

35. *Lilley v. Stout*, 384 F. Supp. 2d 83, 84 (D.D.C. 2005).

36. *Id.* at 85-86.

defendant's title page, which stated, "Photographs by the artist and by Gary Lilley at the direction of the artist," violated his rights under VARA § 106A(a)(1) to "claim authorship of a work he . . . created."<sup>37</sup> However, the District Court for the District of Columbia determined that the plaintiff's intent when he took the photographs was not for the photographs to be "produced for exhibition purposes *only*."<sup>38</sup> Rather, because he reviewed the photographs with the defendant and discussed which frames would "make good studies for a series of paintings," the court concluded that the plaintiff's primary purpose was to "assist the defendant in her artistic endeavor."<sup>39</sup> Due to this interpretation, the plaintiff photographer's complaint was determined to "fail to state a claim under VARA," and thus his VARA claim was dismissed.<sup>40</sup>

*Kelley v. Chicago Park District* ended with a similarly disappointing outcome, as the Seventh Circuit determined that a nationally recognized artist's 66,000 square foot wildflower display located in Chicago's Grant Park did not qualify for protection under VARA because the work did not meet the authorship and fixation requirements under the Copyright Act.<sup>41</sup> The artist therefore had no recourse after the city modified and reduced the size of his installation.<sup>42</sup>

The artist in *Massachusetts Museum of Contemporary Art Foundation v. Büchel* was also left with little recourse under VARA.<sup>43</sup> There, after the parties agreed to work together on a football-field sized exhibition where the artist gave instructions via email and the museum supplied the staff, materials, and financing, the relationship broke down and the artist refused to continue working on the project.<sup>44</sup> However, the museum decided to shift the exhibition's focus to a "documentary project exploring the issues raised in the course of complex collaborative projects between artists and institutions," and attempted to cover any unfinished portions with yellow tarpaulins and disassociate the plaintiff's name from the work.<sup>45</sup> The museum then sought declaratory judgment that it was entitled to present the exhibit to the

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37. *Id.* at 85.

38. *Id.* at 88.

39. *Id.*

40. *Id.* at 89.

41. *Kelley v. Chicago Park Dist.*, 635 F.3d at 302-06. 17 U.S.C. § 102(a) requires that, for a work to be copyrightable, it must be an "original wor[k] of *authorship fixed* in any tangible medium of expression." 17 U.S.C. § 102(a) (1990) (emphasis added). These references to "authorship" and "fixed" have been interpreted to create requirements that copyrightable works be authored—an "entirely human endeavor"—and fixed, as opposed to a naturally occurring, living thing, such as the garden in *Kelley*. See *Kelley*, 645 F.3d at 303-06.

42. *Id.* at 306. While *Kelley* also brought suit under a breach of contract theory, the Seventh Circuit held that there was no implied-in-fact contract to be breached.

43. *Massachusetts Museum of Contemporary Art Foundation v. Büchel*, 593 F.3d 38 (1st Cir. 2010).

44. *Id.* at 43-45.

45. *Id.* at 45-46.

public despite VARA.<sup>46</sup> After the museum won in the district court, it decided to change course and dismantle the installation in response to strong criticism from the art world.<sup>47</sup> However, despite the dismantling of his work, the artist elected to appeal the district court's ruling to the First Circuit.<sup>48</sup> The First Circuit concluded that while VARA protects unfinished works of art that would be protectable if completed, it does not provide a damages remedy for *past attribution violations*, and that by dismantling the exhibition, the defendant museum had prevented further use of the artist's name in connection with the work, thereby eliminating any basis for injunctive relief.<sup>49</sup> Thus, while the First Circuit found that the plaintiff artist had adduced sufficient evidence to survive summary judgment on the issue of whether the museum violated his right of integrity, the plaintiff was, again, left with no recourse under VARA regarding his attribution right claim.

Third, the hurdle of establishing that a work is of "recognized stature" in order to prevent destruction is also often a ground upon which courts rely to deny artists protection under VARA.<sup>50</sup> "Recognized stature" is left undefined in VARA, and the little case law providing guidance on the meaning of the term merely specifies that the artist must show "(1) that the visual art in question has 'stature,' i.e. is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society."<sup>51</sup> Not only does this definition simply restate the terms, themselves, in defining those terms, but it can also be extraordinarily difficult to come up with any evidence of stature if the work was altered or destroyed before it could be reviewed by the community.<sup>52</sup> Additionally, plaintiffs will generally need to call expert witnesses to testify on the issue, ultimately leading to an inevitable battle of experts to resolve the applicability of the statute.<sup>53</sup>

As seen by this history of unsuccessful claims, VARA's extremely narrow application, both textually and by judicial interpretation, makes it an incomplete effort, at best, to satisfy the U.S.' commitment to protect moral rights under Berne.

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46. *Id.* at 46.

47. *Id.* at 47.

48. *Id.*

49. *Id.* at 51-66.

50. Schierman, *supra* note 32.

51. *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999); *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995).

52. Schierman, *supra* note 32.

53. *Id.* There is hope that the issue of what constitutes "recognized stature" may be clarified in the impending decisions of *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212 (E.D.N.Y. 2013) and *Henderson v. Ziman*, No. 2:14-cv-03042-SJO-AS (C.D. Cal. Apr. 21, 2014).

C. Moral Rights under the Lanham Act?  
Where *Dastar* Leaves us Today

*Dastar v. Twentieth Century Fox* represented another opportunity for the U.S. to live up to its § 2(3) assertion, this time regarding the role of the Lanham Act, also known as the Trademark Act of 1946, in protecting moral rights.<sup>54</sup> However, once again, the U.S. failed to seize this opportunity to satisfy Berne's moral rights mandate. The issue in *Dastar* was whether § 43(a) of the Lanham Act<sup>55</sup> prevents the unaccredited copying of a work, or in moral rights terms, the violation of an author's right of attribution.<sup>56</sup> The

54. *Dastar v. Twentieth Century Fox*, 539 U.S. 23 (2003).

55. Section 43(a) of the Lanham Act, codified in 15 U.S.C. § 1125(a), states that:

- (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which
- (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
- (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
- shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act. 15 U.S.C. § 1125(a) (2012).

56. *Id.* at 25. The plaintiff in *Dastar* brought its action under § 43(a) of the Lanham Act because there is a discrete line of authority which maintains that § 43(a)'s court interpreted prohibition against "reverse passing off" (when a defendant removes the source name of a product and sells it in a generic form, or removes another's name or trademark and then proceeds to sell the product under his own chosen name or mark, causing consumer confusion) can be utilized to provide authors with a right to seek proper credit for their work. See Suhl, *supra* note 15, at 1217-18. The leading case on this phenomenon is *Smith v. Montoro*, in which the Ninth Circuit held that an actor had standing to sue a film distributor under § 43(a) because the distributor removed the actor's name from the film's credits and advertising materials, and substituted in the name of another actor. *Smith v. Montoro*, 648 F.2d 602, 603 (9th Cir. 1981). The court found this to be an instance of "express reverse passing off" and thus the complaint stated a valid claim under the provision of the Lanham Act forbidding the use of false designations of origin and false descriptions or representations in the advertising and sale of goods and services. *Id.* at 605-07. Furthermore, contrary to Second Circuit precedent, the court found that the plaintiff had standing to assert this claim, despite the fact that he was "not in any sort of competition" with the defendants, because he had "a reasonable interest to be protected against false advertising," given he was "in the business of providing his talents for use in the creation of an entertainment product." *Id.* at 608. Such use of the "reverse passing off" doctrine under the Lanham Act to enforce the right of attribution is likely one of the reasons why Congress asserted in the BCIA's legislative history that the Lanham Act, along with other preexisting U.S. legal principles, were sufficient to satisfy the U.S.' moral rights obligations under Berne.

However, Suhl aptly points out that, while the right of attribution may be a type of reverse passing off, it is not conceptually interchangeable with a standard reverse passing off case concerning a manufactured product. Suhl, *supra* note 15, at 1218. Specifically, a reverse passing off claim under the Lanham Act requires the plaintiff to demonstrate 1) the goods and

simplified facts of the case consisted of Dwight Eisenhower writing a book about World War II, entitled *Crusade in Europe*, and his publisher, Doubleday, then assigning exclusive television rights for the book to Twentieth Century Fox.<sup>57</sup> Doubleday renewed the copyright in the book, but Fox failed to renew the copyright in the television series, thus leaving the series in the public domain.<sup>58</sup> Dastar, a compact disc seller that had recently decided to expand its product line to videos, then used the public domain television series footage to create a video set commemorating World War II campaigns in Europe.<sup>59</sup> In creating this new work, Dastar removed references to and images of the book, gave the series a new title, and sold the video set as its own product with no reference to the original *Crusade* television series or book.<sup>60</sup> Fox, along with a number of other parties, including Doubleday's successor Random House, sued Dastar in 1998, alleging 1) infringement of the publisher's copyright in the book; 2) infringement of Fox's exclusive television rights; and most relevant to this discussion, 3) "that Dastar's sale of *Campaigns* 'without proper credit' to the *Crusade* television series constitutes 'reverse passing off' in violation of § 43(a) of the Lanham Act."<sup>61</sup>

In rejecting Fox's Lanham Act claim, the Supreme Court emphasized that "the right to copy, without attribution, once a copyright has expired . . . passes to the public . . . . Thus, in construing the Lanham Act, [the Court has] been careful to caution against misuse or over extension of trademark and related protections into areas traditionally occupied by patent or copyright."<sup>62</sup> Perhaps the most memorable part of the opinion is the conclusion that "allowing a cause of action under § 43(a) for [this] representation would create a species of mutant copyright law that limits the public's federal right to copy and to use expired copyrights."<sup>63</sup> Therefore, the Supreme Court made it clear in *Dastar* that § 43(a) of the Lanham Act could not be used to enforce copyright holders' right of attribution.<sup>64</sup> While *Dastar* involved a

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services in question are involved in interstate commerce; 2) he has standing to sue under the Lanham Act, which requires proof of a competitive injury or commercial injury causally linked to the misleading information; and 3) he has a genuine interest protected by the act, meaning the claim must be based on actual consumer confusion. *Id.* at 1219. Even in courts that follow the discrete *Montoro* holding, litigants hoping to assert a right to attribution typically cannot meet these requirements, thereby rendering ineffective the use of "reverse passing off" as a reliable way to assert this moral right.

57. *Dastar*, 539 U.S. at 25-26.

58. *Id.* at 26.

59. *Id.*

60. *Id.* at 26-27.

61. *Id.* at 27.

62. *Id.* at 33-34.

63. *Id.* at 34.

64. See Graeme W. Austin, *The Berne Convention as a Canon of Construction: Moral Rights After Dastar*, 61 N.Y.U. ANN. SURV. AM. L. 111, 119 (2005) ("the Court's holding [in *Dastar*], interpreted broadly, swept away most of the protections against misattribution of

work in which the copyright had expired, subsequent cases have declined to regard this fact as material, and have held that *Dastar* also applies to works still within their copyright terms.<sup>65</sup>

Thus, the U.S.' lofty and self-serving assertion in § 2(3) of the BCIA, followed by VARA, its extraordinarily limited application judicially, and *Dastar* have all reflected and confirmed the Berne Convention's *rhetorical* role in shaping the U.S. Copyright system's treatment of moral rights. While the moral rights *buzzwords* of "attribution" and "integrity" were relatively quickly inserted into the U.S. Code under VARA after the implementation of Berne, the true significance of these rights has been largely ignored in the application of the law. Due to the fundamental conflict between the U.S.' theory of copyright and that of the Continental European countries that drafted Berne, the future likely holds a continued disapproval and non-acceptance of moral rights in the United States.

## II. THE EFFECT OF THE BERNE CONVENTION ON COPYRIGHT TERM IN THE U.S.

As mentioned in section I.A., Article I, § 8, Clause 8 of the Constitution grants Congress the power "to promote the Progress of Science and useful Arts, by securing for *limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>66</sup> In determining the appropriate length of copyright term, the inquiry has become *just how many years does "limited Times" allow?* While the Berne Convention mandated a copyright term of life of the author plus fifty years all the way back in 1886<sup>67</sup>, the U.S. lagged behind the developed nations of the world in the realm of copyright term until it finally matched Berne in the 1976 Copyright Act.<sup>68</sup> Congress explicitly stated in the 1976 Act's legislative history that it made this move because of the pressure exerted upon the U.S. by the Berne Convention, thereby confirming Berne's *practical* role in shaping the U.S.'

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the creative content of works of authorship that the Lanham Act was once assumed to provide.").

65. See, e.g., *Zyla v. Wadsworth*, 360 F.3d 243 (1st Cir. 2004) (applying *Dastar* to a textbook still within its copyright term, and reasoning that *Dastar* fundamentally stands for the proposition that in cases brought under § 43(a)'s prohibition against false designations of origin, the "term 'origin' applies only to 'the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods.'"); *General Universal Sys. v. Lee*, 379 F.3d 131 (5th Cir. 2004) (applying *Dastar* to software still within its copyright term based on the same reasoning as expressed in *Zyla*); *Williams v. UMG Recordings, Inc.*, 281 F. Supp. 2d 1177, 1185 (C.D. Cal. 2003) (finding that "the Supreme Court's holding [in *Dastar*] did not depend on whether the works were copyrighted or not."); *Carroll v. Kahn*, 68 U.S.P.Q.2d 1357, 1361-62 (N.D.N.Y. 2003) (holding, with respect to a copyrighted work, that "[a] Lanham Act claim based on Defendants' alleged failure to give Plaintiff proper credit as author and/or producer. . . is foreclosed by *Dastar*.").

66. U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

67. Berne Convention, *supra* note 5, at art. 7(1).

68. The Copyright Act of 1976, Pub. L. No. 94-553, § 302, 90 Stat. 2541 (1976).

treatment of copyright term.<sup>69</sup> Furthermore, due to the influential lobbying power of goliath U.S. copyright owning corporations, I have no doubt that we will see a further extension of copyright term past the current duration of life plus seventy in the near future. And perhaps most importantly, I have no doubt that “*limited Times*,” normatively and as interpreted by the U.S. Supreme Court, permits a copyright term of more than life of the author plus seventy years.

A. *The History of Copyright Term in the U.S. and the Pressure Exerted by the Berne Convention*

In order to appreciate the magnitude of the Berne Convention’s effect on the U.S.’ treatment of copyright term, an overview of the growth of copyright term in the U.S. is necessary. The first copyright act written after the establishment of the intellectual property right in the Constitution was the Copyright Act of 1790.<sup>70</sup> The Act granted authors two fourteen-year terms of protection, totaling twenty-eight years of copyright term if the first term was renewed.<sup>71</sup> This number originated from the two fourteen-year terms granted to authors in England under the 1710 Statute of Anne.<sup>72</sup> The Statute of Anne marked a significant departure from traditional copyright maxims in England. It represented a shift from copyright being used as a tool for governmental censorship into a tool for encouragement of learning, and granted rights of *limited* duration, whereas previously the stationer’s right had endured in perpetuity.<sup>73</sup> The United States Constitution, and the Copyright Act of 1790, borrowed and implemented these underlying copyright maxims as a result of states’ enacting statutes similar to the Statute of Anne after the American Revolution.<sup>74</sup>

February 3, 1831 brought the first general revision of the Copyright Act.<sup>75</sup> Along with adding music to the list of protected works (which at that point included books, maps, charts, and prints), the 1831 revision extended the first term of copyright to twenty-eight years, with the privilege of renewal for another term of fourteen years.<sup>76</sup> This extended copyright term to a total of forty-two years. The House Committee on the Judiciary, in its first copyright committee report, described this extension as an effort to “place

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69. H.R. REP. NO. 94-1476, at 135 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5751.

70. *The Copyright Clause of the United States Constitution and Its Historical Background*, COPYRIGHT EXTENSION, <http://www.copyrightextension.com/page00.html> (last visited Sept. 11, 2016).

71. *Id.*

72. *Id.*

73. COHEN, *supra* note 1, at 22.

74. *The Copyright Clause*, *supra* note 70.

75. *Id.*

76. *A Brief Introduction and History*, UNITED STATES COPYRIGHT OFFICE, <http://copyright.gov/circs/circ1a.html> (last visited Sept. 11, 2016).

authors in this country more nearly upon an equality with authors in other countries . . . . The United States ought to be foremost among nations in encouraging science and literature, by securing the fruits of intellectual labor.”<sup>77</sup> However, the reality at that time was the U.S. was far behind France’s copyright term of life of the author plus fifty years, Russia’s copyright term of life of the author plus twenty years, and Germany, Norway, and Sweden’s grant of perpetual rights.<sup>78</sup> Recognizing this continuing gap, the House Committee on the Judiciary declared that the U.S. “ought to present every reasonable inducement to influence men to consecrate their talents to the advancement of science . . . . It cannot be . . . that intellectual labor should be depreciated, and a life devoted to research and laborious study terminate in disappointment and poverty.”<sup>79</sup> Ironically, this declaration was preceded by over a century of the U.S. lagging behind the vast majority of developed nations in the realm of copyright term.

The third general revision of the Copyright Act, the 1909 Act, took steps to bring the U.S. into closer conformity with the rest of the world, but still fell short. Instead of acceding to the Berne Convention and its required copyright term of life of the author plus fifty years, the U.S. elected instead to extend the renewal term to twenty-eight years, bringing copyright term to a total of fifty-six years.<sup>80</sup> The Act also allowed widows, widowers, children, executors, and next of kin of deceased authors to exercise the renewal right.<sup>81</sup> However, the Congressional reports for the 1909 Act made clear that the Berne Convention’s life plus fifty minimum term mandate was weighing on Congress’ mind, eighty years before the U.S. finally joined Berne and sixty-seven years before the U.S. matched Berne’s copyright term provision. In describing Congress’ rationale behind the 1909 Act’s extension of copyright term, the House Report expressed concern that “four countries provide for perpetual rights, two for life of the author and eighty years, *fifteen for life of the author and fifty years*, four for life of the author and thirty years, one for the life of the author and twenty-five years, two for life of the author and twenty years, and one for the life of the author and ten years. In Great Britain and in nearly all the English colonies the term is life of the author and seven years . . . . *Only one country has a shorter term than the existing term in the United States.*”<sup>82</sup>

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77. H.R. REP. NO. 145, at 1 (1830). A print copy of this report is available in REGISTER OF DEBATES IN CONGRESS cxx (Gales & Seaton 1831).

78. *The Copyright Clause*, supra note 70.

79. H.R. REP. NO. 145, at 2 (1830). A print copy of this report is available in REGISTER OF DEBATES IN CONGRESS cxx (Gales & Seaton 1831).

80. *The Copyright Clause*, supra note 70.

81. *Id.*

82. H.R. Rep. No. 59-7083, at 13 (1907), reprinted in 6 E. FULTON BRYLAWSKI & ABE A. GOLDMAN, LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT (1976) (emphasis added).



The fourth general revision to the Copyright Act, the 1976 Act, finally established a copyright term of life of the author plus fifty years, thereby bringing the U.S. into conformity with Berne Convention signatories around the world regarding copyright term.<sup>83</sup> While the House Report explained Congress' rationale for this significant extension included that fifty-six years was "not long enough to insure an author and his dependents the fair economic benefits from his works," and the growth of communications media had "substantially lengthened the commercial life of a great many works," there was one justification to which the report gave the most lip service.<sup>84</sup> In the seventh and final justification expressed for the extension of copyright term to life plus fifty, the report stated that,

A very large majority of the world's countries have adopted a copyright term of the life of the author and fifty years after the author's death. . . . The need to conform the duration of U.S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealings. Even more important, a change in the basis of our copyright term would place the United States in the forefront of the international copyright community. *Without this change, the possibility of future United States adherence to the Berne Copyright Union would evaporate, but with it would come a great and immediate improvement in our copyright relations.* All of these benefits would accrue directly to American and foreign authors alike.<sup>85</sup>

There could not be a more clear expression of Berne's *practical* role in shaping the treatment of copyright term in the United States. It may have taken ninety years, but the Berne Convention's mandate of life plus fifty ultimately pressured the U.S. into making practical changes to its policy on copyright term. Not only did the U.S. match Berne's mandate in 1976, but it also seized the role of world-leader in the movement to extend copyright term on the international stage.<sup>86</sup>

#### B. *Another Angle to the Copyright Term Growth Story; How the U.S. Got to Life Plus Seventy*

One key interest served by the 1976 Copyright Act is not mentioned in the legislative history, and its existence explains why copyright term in the

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83. *The Copyright Clause, supra* note 70.

84. H.R. Rep. No. 94-1476, at 134 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5750.

85. *Id.* at 135.

86. This world-leader role is evident from the U.S.' taking the lead in pushing for widespread adoption of the 1994 Agreement on Trade Related Aspects of Intellectual Property (TRIPS) and the Obama Administration's more recent and controversial advocacy for the Trans-Pacific Partnership Agreement (TPP), which increases the minimum copyright term that must be offered by signatories to life of the author plus seventy years. *See* Trans-Pacific Partnership, art. 18.63(a), Feb. 14, 2016, available at <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf>. However, the Trump Administration is unlikely to match Obama's zealous support of the contentious trade agreement.

U.S. has continued to grow, and why further extensions are highly probable. In order to grasp the significance of this interest's political sway, we must venture further down the copyright term rabbit hole. In addition to adopting life plus fifty, the 1976 Act granted a nineteen-year retroactive extension of copyright term for works published before the new system took effect in 1978.<sup>87</sup> This extended the maximum term for works *already* published from fifty-six years to seventy-five years.<sup>88</sup> Works published between 1922 and 1941 that would have entered the public domain between 1978 and 1997 instead remained under copyright.<sup>89</sup> Most notably, these works included the original Mickey Mouse cartoon, "Steamboat Willie."<sup>90</sup> This retroactive extension of incredibly lucrative copyrights, owned by corporations like Disney that commanded considerable lobbying power, led commentators to conclude that Congress was simply granting a windfall to interested and influential parties.

This skepticism of Congress' motivation exploded into litigation following the most recent extension of copyright term, established in the 1998 Sonny Bono Copyright Term Extension Act (the "CTEA").<sup>91</sup> The CTEA added another twenty years, presently and retroactively, to the term of copyright, bringing the total to life of the author plus seventy years—the current status of copyright term in the U.S.<sup>92</sup> The contentiousness arising out of the CTEA stemmed from the Act's *retroactive* extension of twenty years for copyrighted works soon to fall into the public domain, thereby extending their protection from seventy-five years to ninety-five years. Works from the early 1920s were, once again, scheduled to enter the public domain, this time beginning in 1998, and copyright owners like Disney wanted to prevent that from happening; Bill Clinton's signing of the CTEA into law in 1998 was no coincidence.<sup>93</sup> Granted, there was another interest animating Congress' action in 1998. In 1993, the European Union added twenty years to the term of European copyrights under Council Directive 93/98/EEC, thereby extending copyright protection to authors for a term of life plus seventy years.<sup>94</sup> Extending copyright term to bring the U.S. into conformity with the rest of the developed world has been a repeatedly expressed reason for previous term extensions, and offers a less *crooked* rationale for Congress' decision to add twenty years to U.S. copyright term. However, there is no doubt that influen-

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87. COHEN, *supra* note 1, at 161.

88. *Id.*

89. Timothy B. Lee, *15 years ago, Congress kept Mickey Mouse out of the public domain. Will they do it again?*, THE WASHINGTON POST (Oct. 25, 2013), <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/>.

90. *Id.*

91. COHEN, *supra* note 1, at 160.

92. *Id.*

93. Lee, *supra* note 89.

94. *Id.*

tial copyright proprietors played a large role in the CTEA's passage, particularly with regard to the *retroactive* nature of the extension.

As previously stated, the response to this most recent extension was litigation. In *Eldred v. Ashcroft*, the CTEA's twenty year extension of copyright term was challenged on the basis that 1) it violated the First Amendment by forcing the public to wait another twenty years until works published in the 1920s would be free to use; and most importantly 2) that the extension violated the Constitution's "*limited Times*" requirement expressed in Article I, § 8, Clause 8.<sup>95</sup> These arguments failed at the Supreme Court. Justice Ginsberg, writing for a seven member majority, determined that, with respect to the First Amendment claim, the "Copyright Clause and First Amendment were adopted close in time," and this proximity "indicates that in the Framers' view, copyright's limited monopolies are compatible with free speech principles."<sup>96</sup> She then concluded that, regarding the "*limited Times*" claim, Congress had broad discretion to choose copyright terms and to retroactively extend them as it saw fit, and as long as the term remained "confined, circumscribed," or in other words, *finite*, then it satisfied the Constitution's "*limited Times*" requirement.<sup>97</sup>

### C. Will Copyright Term Continue to Grow?

This historical analysis leaves us with the questions of whether copyright term *will*, and whether it *should*, continue to grow. I am confident that it both *will* and *should*. First and foremost, we know from *Eldred* that it *can* under the Constitution. As long as copyright term remains "confined" or *finite*, it abides by the Constitutional mandate of "*limited Times*."<sup>98</sup>

Second, it must be noted that, starting on January 1, 2019, works published beginning in 1923 will start to enter the public domain.<sup>99</sup> One of those works will, again, be Disney's original Mickey Mouse cartoon, "Steamboat Willie," which is due to enter the public domain this time around on January 1, 2024.<sup>100</sup> Granted, there is not currently another powerhouse country with a longer copyright term that the U.S. can use to justify a further extension.<sup>101</sup> However, even without this term-equalizing justification, there is no ignor-

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95. *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003).

96. *Id.* at 219.

97. *Id.* at 199-204.

98. *Id.*

99. Lee, *supra* note 89.

100. *Id.*

101. As seen from the legislative history of previous copyright legislation, past extensions were justified as keeping up with England, the European Union, and the Berne Convention's copyright terms. While there are countries with longer terms than life plus 70, such as Mexico (life plus 100), and Colombia (life plus 80), these are not the countries with which the U.S. has traditionally competed in terms of intellectual property rights. See *Commons: Copyright Rules by Territory*, WIKIMEDIA COMMONS, [https://commons.wikimedia.org/wiki/Commons:Copyright\\_rules\\_by\\_territory](https://commons.wikimedia.org/wiki/Commons:Copyright_rules_by_territory) (last updated Aug. 18, 2016).

ing the very real influence that powerful copyright proprietors like Disney have on Congress. As 2024 approaches, I have no doubt that copyright extension legislation will be proposed and heavily lobbied for by these interested parties, and there is a very good chance that they will be successful.

#### D. *Should Copyright Term Continue to Grow?*

Putting aside these legal and political arguments for why copyright term *will* continue to grow, I want to explain why copyright term *should* continue to grow. Content creators invest their lives—their time, money, energy, and relationships—into making works of authorship for the world to enjoy, to learn from, and to build upon. The financial exploitation of these works serves as a form (perhaps even the sole form) of sustenance for the content creator and his family. The only way such life-sustaining exploitation can occur (and the only way the content creator can continue devoting his life to creating original works of authorship) is if the fruits of the content creator's labor are protected by a right to exclude—a *property right*—so others cannot simply use the work of authorship for free. Surely, protection during the author's life would satisfy the author's need to provide for himself and perhaps his family while the author remains alive. But there is more to a *property right* than it simply existing during the life of the owner, or even during the life of the owner's children.

Take, for example, a farm. A man in his twenties built the farm from scratch, and for fifty years, he cares for the milk and meat-producing livestock, tills and seeds the fields, harvests the fruit from the vines of his crops, and polices the farm's borders to keep out intruders and thieves. All of his investments—his expenditure of time, money, and energy to keep the farm operating successfully—are in an effort to enrich the public good by allowing the community to enjoy his produce, but most importantly to sell the produce from the farm in order to support himself and his family.

After a life dedicated to this demanding occupation, the man dies, leaving behind his wife and three children, who were dependent on the proceeds from the farm to survive. Should the family be stripped of the farm, by the government declaring that it now belongs to the public for everyone to use and enjoy without charge? Surely, the answer is no. The farm should pass on to the man's family, as the governing reason he worked so hard, and invested so much into cultivating, protecting, and exploiting the products derived from the farm was to support his family. Granted, seventy years of property rights to the farm for the family to enjoy after the man's death would certainly cover the needs of the deceased man's wife and children. But what about his children's children? Should they be deprived of enjoying the fruits of their grandfather's labor, by the government declaring that the farm now belongs to the public for everyone to use and enjoy without charge? Surely, the answer, again, must be no. The grandchildren should

have the right to reap the benefits of their grandfather's unending hard work and investments into the success of the farm, as they, too, may be dependent on its exploitation to survive.

This farm hypothetical could go on and on, generation after generation, and I would argue that the answer should not change at any point. However, when applied to copyright, the hypothetical cannot go on in perpetuity, for that would not be "*limited*" in duration, and thus would be unconstitutional. But analogizing the man to an author, the farm to the author's original work of authorship fixed in tangible form, and the produce from the farm to the consumer products embodying the copyrighted work, it becomes clear that there is every reason to allow copyright term to cover the author, the author's children, the author's children's children, and even more generations to come after that, while confining the term to some *finite* number of years. When the creation and exploitation of a copyrighted work requires laborious *cultivation*, in the form of inceptive trial and error, marketing, distribution, and policing infringement, it makes sense for the author to rest assured that his life's work will continue to support his family for generations to come. Applying this rationale, I would *welcome* another twenty years of copyright term, and another twenty years after that. The House Committee on the Judiciary in 1831 was on to something when it declared, "it cannot be . . . that . . . a life devoted to research and laborious study terminate in disappointment and poverty."<sup>102</sup> Not only is this sentiment true for the life of the author himself, but it also extends to the lives of his family, and his family's family.

There are some wrinkles to this argument that should be straightened out. First, copyrighted works may be assigned to individuals who are not the original author, and thus the exploitation of the work would not support the author's family. However, this does not destroy the farm hypothetical and analogized theory, as the man who built the farm could sell it (assign his rights in it) to another individual for substantially *more* consideration if the property right in the farm lasted for more years than would otherwise be the case. The later generations of the man's family could then utilize this increased amount of compensation to support themselves. The same goes for authors assigning their rights to outside individuals in exchange for valuable consideration that is higher than it otherwise would be because copyright term is longer. The author's family and later generations could then live off of that increased amount of compensation.

Second, copyrighted works in and of themselves are valuable because they can be licensed for use, and are not just valuable for the sale of products in which they can be incorporated. But in the farm hypothetical, the same can be true, as one could imagine that the man could rent portions of his

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102. H.R. REP. NO. 145, at 2 (1830). A print copy of this report is available in REGISTER OF DEBATES IN CONGRESS cxx (Gales & Seaton 1831).

farm to other interested parties to cultivate and keep the produce, in exchange for valuable consideration, and perhaps a royalty on the sales of that produce.

Third, this theory is susceptible to attack on the very reasonable grounds that an even longer copyright term would be antithetical to the “Progress of Science and useful Arts,” as the public would have to wait a significant amount of time for the author’s property right to terminate and thereby to benefit from his creations. However, a robust interpretation and application of the fair use doctrine, codified in 17 U.S.C. § 107, would address this concern, given its exceptions to copyright’s § 106 exclusive rights for uses such as criticism, comment, teaching, scholarship, and research.<sup>103</sup> Section 110 provides even more exceptions for certain performances and displays, including face-to-face teaching activities in a classroom.<sup>104</sup> Furthermore, the public *does*, in fact, benefit from the value of an author’s copyrighted work, even when its term lasts throughout multiple generations of the author’s family, in the form of *estate tax*. The fair market value of intellectual property in a decedent’s estate is included in the calculation of estate tax, and thus the public benefits from the value of the copyrighted work when it passes from one generation to another through the federal government’s (the Internal Revenue Service’s) collection and spending of tax dollars on social welfare.<sup>105</sup> Therefore, the Copyright Act’s statutory exceptions, if applied generously, along with the collection and allocation of estate taxes, would provide for public benefit and the “Progress of Science and useful Arts,” while allowing the author’s hard earned property right in his copyrighted work to last long enough to support the later generations of his family.

Lastly, it should be noted that this theory is separate and apart from the utilitarian theory of copyright. I am not arguing that authors will be any more incentivized to create by receiving copyright for life plus ninety than if they received life plus seventy (or fifty, for that matter). Rather, I am arguing that the fruits of an author’s lifelong labor should be enjoyed by not only his children, but his children’s children, for that is how a property right truly operates.

#### CONCLUSION

One hundred and two years passed between the signing of the Berne Convention in 1886, and the U.S.’ formal accession to the treaty in 1988. Despite this embarrassingly lengthy delay in joining the most influential copyright treaty of the century, Berne still played a *practical* and merely

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103. 17 U.S.C. § 107 (1992). For a discussion of a “broad public domain,” see Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

104. 17 U.S.C. § 110 (2005).

105. See Claudia L. Kelley & Tamara Kowalczyk, *Tax Issues for Individuals Who Create Intellectual Property*, THE TAX ADVISER (Dec. 1, 2013), <http://www.thetaxadviser.com/issues/2013/dec/kelley-dec2013.html>.

*rhetorical* role in shaping the U.S. copyright system to conform to the treaty's author-friendly provisions.

Rhetorically, in response to Berne, the U.S. enacted VARA and declared in § 2(3) of the BCIA that pre-existing U.S. legal principles already protected the moral rights mandated in Article 6*bis* of the treaty. However, VARA's extraordinarily narrow textual and judicially interpreted application, coupled with U.S. courts' refusal to uphold moral rights under various non-copyright legal theories, demonstrates that the U.S. is willing to insert moral rights buzzwords into the U.S. Code, but nothing more. Furthermore, due to the unavoidable clash between the U.S. copyright system's utilitarian underpinnings, and the natural rights-based copyright systems of Berne's Continental European drafters, this reluctance will likely persist.

Practically, Berne succeeded in convincing the U.S. to increase its copyright term to life plus fifty, as evidenced by the explicit credit given to the treaty for this term increase in the 1976 Copyright Act's legislative history. But perhaps most importantly, Berne's rallying of powerful nations around the common goal of protecting authors' rights forced the U.S. to take an active, and ultimately leading, role in advocating for robust copyright protection around the world. The growth of U.S. copyright term to life plus seventy and its very likely continued growth in the near future, the Obama administration's pushing for widespread adoption of the Trans-Pacific Partnership Agreement, and the Supreme Court's holding in *Eldred v. Ashcroft* that any term length that is somehow *limited* is constitutional all reflect this effort. And though it perhaps tests the limits of the copyright system, the U.S.' Berne-influenced efforts to advance authors' rights lend credence and feasibility to the viewpoint that copyright term should last as long as necessary, albeit *finitely*, to benefit the author's family, his family's family, his family's family's family, and the generations to come thereafter.