COPYRIGHT AND TIME: A PROPOSAL

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INTRODUCTION

This Article makes a very specific and concrete proposal: it argues that courts should adjust the scope of copyright protection to account for the passage of time by expressly considering time as a factor in fair

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use analysis. More specifically, this Article argues that the older a copyrighted work is, the greater the scope of fair use should be — that is, the greater the ability of others to re-use, critique, transform, and adapt the copyrighted work without permission of the copyright owner. Conversely, the newer the work, the narrower the scope of fair use. Or, even more concretely, this Article argues that fair use should be greater for Mickey Mouse than for Harry Potter.

Up to now, most of the debate over the role of time in copyright law has focused on copyright duration and the controversial issue of copyright term extension. Since passage of the first Copyright Act in 1790, Congress has dramatically extended the copyright term from an original maximum term of twenty-eight years to the current term of seventy years after the death of the author. Congress's most recent extension of the term in 1998 touched off a fierce debate over both the propriety and constitutionality of this extension. Those supporting the extension have argued, inter alia, that a longer term encourages creative activity, that it is necessary to provide incentives to preserve copyrighted works in the digital age, and that it is necessary to harmonize our copyright laws with those of other countries. Those opposing

1. See 17 U.S.C. § 107 (1994) ("[T]he fair use of a copyrighted work ... is not an infringement of copyright.").


7. See, e.g., Hon. Howard Coble, Recent Developments in Intellectual Property, 22 COLUM.-VLA J.L. & ARTS 269, 296 (1998); Sen. Orrin G. Hatch, Toward a Principled Ap-
the extension have argued that it effectively provides no additional incentive for creative activity,\(^8\) that it harms the public by depriving it of free access to works, and that it may well be unconstitutional.\(^9\)

By focusing so narrowly on the end of the copyright term, however, this debate has neglected the significant issue of how time should affect the scope of copyright protection during the copyright term. That is, whether or not the most recent extension is justified or constitutional, the fact remains that the copyright term is extremely long. Until now, courts and commentators have generally assumed that the scope of protection during this long term is constant or unaffected, at least directly, by the passage of time. Perhaps this assumption made sense when the copyright term was a short twenty-eight years, but does it still hold when the term of protection can span an entire century? Are the policies and justifications underlying copyright law really unaltered by the passage of time? What implications might there be for the appropriate scope of copyright protection? Up to now, these questions have been left largely unaddressed.

In this Article, I will argue that extremely strong justifications exist for considering time expressly in setting the scope of copyright protection, and that fair use provides an ideal vehicle, both doctrinally and theoretically, for such consideration.\(^10\) Indeed, an examination of the

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\(^9\) See, e.g., Paul J. Heald & Suzanna Sherry, Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress, 2000 U. ILL. L. REV. 1119 (concluding that the term extension likely exceeded implied limits on Congressional authority imposed by the Copyright Clause); Lawrence Lessig, Copyright's First Amendment, 48 UCLA L. REV. 1057 (2001); Neil Weinstock Netanel, Locating Copyright Within the First Amendment Skein, 54 STAN. L. REV. 1 (2001) (applying intermediate First Amendment scrutiny to term extension and finding that term extension fails). For a more comprehensive list of articles on the constitutionality of the term extension, see infra note 90.

\(^10\) A more limited version of this proposal has been advanced in Note, Gone With the Wind Done Gone: "Re-Writing" and Fair Use, 115 HARV. L. REV. 1193 (2002). In that Note, the author analyzes the specific problem of "re-writing" of existing creative works and suggests that courts, inter alia, take into account the age of the work when deciding such cases. See id. at 1211 n.115 ("The proposal put forth here is limited to re-writings . . . "). In this Article, I advance the broader claim that courts should consider time as part of fair use
theoretical justifications underlying copyright law reveals that the strength and impact of these justifications are quite directly affected by the passage of time. As I will show, over the course of the copyright term, the impact of protection on copyright incentives wanes, as does an author's moral claim to the fruits of his or her labor. At the same time, the societal interest in ensuring widespread access to works and in encouraging re-use and adaptation of copyrighted works increases. By considering time in fair use analysis, courts can adjust the scope of copyright protection to respond more dynamically to these changes in copyright interests over the length of the copyright term.

Furthermore, such a result could be achieved quite easily within existing copyright case law. Unlike constitutional challenges to term extension, this result would not require courts to stretch the doctrine or strike down any statutes. Indeed, existing doctrine provides ample support for consideration of time as a factor in fair use analysis. The Copyright Act and its legislative history expressly authorize courts to consider additional factors in fair use analysis, and courts have used this authorization to consider a wide range of additional factors not expressly mentioned in the statute. Given the strong theoretical arguments for considering time, courts should feel quite comfortable incorporating this inquiry into fair use analysis. Consideration of time would thus be a modest doctrinal change that could have significant benefits.

Finally, the proposal advanced in this Article would provide courts with a legitimate way to inject much-needed public-regarding values into the scope of copyright protection. One of the concerns underlying the debate over copyright term extension is the extent to which this extension, like all prior extensions, resulted from a structural imbalance in lobbying power. While the benefits of term extension accrue to a few, highly-focused and well-organized interests, the costs of extension, though significant in the aggregate, are more widely distributed among the population at large. Term extensions are thus difficult to oppose, as public choice theory predicts. Indeed, this imbalance has been reflected not only in the struggle over term extension, but also in

analysis generally, and seek to ground this broader claim more comprehensively in existing copyright theory.

Justin Hughes also advances a similar proposal in a forthcoming article. Justin Hughes, Fair Use Across Time, 50 UCLA L. REV. (forthcoming 2003) [hereinafter Hughes, Fair Use]. Although the broad outline of Hughes's proposal is similar to the one advanced in this Article (in that both call for some consideration of time in fair use analysis), the theoretical justifications for Hughes's proposal and the specifics of its implementation are quite different. Id.

12. See infra Section III.A.
13. See infra Section II.D.
other Congressional expansions of copyright protection. For those concerned about this structural imbalance, this Article provides a mechanism for courts to legitimately incorporate public-regarding values into the scope of copyright protection. Even for those who are not concerned, however, the general policy justifications underlying copyright law provide strong support for this proposal.

The rest of this Article explains the proposal in more detail and builds the case in support of it. Part I provides the context for the proposal, describing the debate over term extension and the arguments on both sides of the issue. It then briefly sketches out the proposal and explains how it relates to this wider debate. Part II then examines the theoretical argument in support of the proposal, concluding that it finds extremely strong support under several different theories underlying copyright law. I start with the policy arguments, rather than the doctrine, because these arguments provide the impetus for the proposal. Part III then builds the doctrinal case for the proposal, examining the doctrine, case law, and legislative history for support. The conclusion I reach is that the copyright act clearly authorizes courts to consider time in their fair use analysis, and that, given the strong policy reasons supporting such a consideration, they should do so. Part IV then returns to the proposal and fleshes it out by applying it to a number of examples and showing how the proposal would have many concrete benefits. Part IV concludes by addressing a number of anticipated objections.

I. THE PROPOSAL IN CONTEXT

A. The Debate over Term Extension

For the next sixteen years, not a single published, copyrighted work in the United States will pass into the public domain. That is, from now until December 31, 2018, not one published, copyrighted work will have its term of copyright protection expire. This is because Congress passed the Sonny Bono Copyright Term Extension Act in 1998, extending the term of copyright protection by an additional twenty years. For works authored by individuals, the term now extends until seventy years after the death of the author; for works
"authored" by corporate entities, the term is now ninety-five years from the date of publication or 120 years after creation, whichever expires first. Not only does this apply to future works, but Congress also made this extension retroactive, applying it to all existing works still under copyright protection at the time the extension went into effect. As a result of this retroactive extension, no published works will pass into the public domain for twenty years after the Act went into effect.

The impact of this extension on copyright markets is significant. Until passage of the extension, copyrighted works had been passing into the public domain at a steady pace. In 1998, for example, T.S. Eliot's *The Waste Land*, James Joyce's *Ulysses*, and the movie *Blood and Sand* with Rudolph Valentino all passed into the public domain. In 1996 and 1997, F. Scott Fitzgerald's *This Side of Paradise*, D.H. Lawrence's *Women in Love*, Edith Wharton's *The Age of Innocence*, and the song *Over There* by George M. Cohan all passed into the public domain. What this meant was that these works could now be freely copied, distributed, and built upon by others. So if you wanted to print and sell copies of *The Waste Land*, you could freely do so without seeking a license from, or paying a royalty to, the copyright owner. Similarly, if you wanted to write and sell your own sequel of *This Side of Paradise*, or make a movie out of *The Age of Innocence*, you could do so. All of these uses were now freely permitted once the term of copyright protection ended.

18. Or, more precisely, works "made for hire"; the Copyright statute considers the employer to be the "author" of works made by an employee or independent contractor under some circumstances. See § 302(c). Anonymous and pseudonymous works also share this same term. Id.

19. Id.


23. BLOOD AND SAND (1922).

24. These examples and many others can be found at Dennis Karjala's excellent web site, Opposing Copyright Extension, at http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension (last visited June 6, 2002) [hereinafter Karjala, Website].

25. F. SCOTT FITZGERALD, THIS SIDE OF PARADISE (1920).


29. See Karjala, supra note 24.
The fact that these works passed into the public domain was no accident. Rather, it was an essential part of the design of copyright law.\(^30\) The basic idea behind copyright law is that an author gets a certain number of years during which he or she can prevent unauthorized copying and distribution of the creative work. This exclusive period permits the copyright owner to exploit the work and obtain a return for his or her creative labor, thus providing an incentive to engage in the labor in the first place. This period of exclusive control is limited, however. The Constitution expressly authorizes copyright protection only for "limited Times,"\(^31\) and the Copyright Act places precisely such a limit on the duration of copyright.\(^32\) The idea behind the limited grant is that, after an author has been sufficiently compensated\(^33\) for his or her creative labor, the work should pass into the public domain so that all of society can use it freely, so that it can be disseminated more broadly, and so that its expressive elements can be appropriated and built upon.\(^34\) This reflects the balance struck by copyright law between providing incentives for creation and promoting wide dissemination of the fruits of this creation.

Because of the Sonny Bono Copyright Term Extension Act,\(^35\) however, many copyrighted works that were scheduled to pass into the public domain in the years from 1998 through 2018 will now remain copyrighted for an additional twenty years. Among these works are Disney's original Mickey Mouse\(^36\) (originally scheduled to expire in

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\(^30\) See, e.g., Stewart v. Abend, 495 U.S. 207, 228 (1990) ("The copyright term is limited so that the public will not be permanently deprived of the fruits of an artist's labors."); Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984) ("[Copyright] is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."); David Lange, Recognizing the Public Domain, 44 LA W & CONTEMP. PROBS., Autumn 1981, at 147, 171; Jessica Litman, The Public Domain, 39 EMORY L.J. 965 (1990).

\(^31\) U.S. Const. art. I, § 8, cl.8 (granting Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); see also Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 UCLA L. REV. 1180, 1193 (1970).


\(^33\) Not surprisingly, there is much difference of opinion over what is "sufficient." See infra Section II.A.

\(^34\) See Litman, Public Domain, supra note 30; David Nimmer, The End of Copyright, 48 VAND. L. REV. 1385, 1416 (1995) ("[W]orks are relegated to the public domain to become the heritage of all humanity and copyright is simply a temporary way station to reward authors on the road to that greater good.").


\(^36\) See STEAMBOAT WILLIE (Walt Disney 1928). Pluto would have gone into the public domain in 2006, and Goofy in 2008. Similarly, the copyright in A.A. Milne's Winnie the Pooh, which Disney had just recently acquired, was also scheduled to fall into the public domain. See Jon Garon, Media & Monopoly in the Information Age: Slowing the Conver-
George Gershwin’s *Rhapsody in Blue* (originally scheduled to expire in 1999), numerous works by Cole Porter, Irving Berlin, Hoagy Carmichael, Ernest Hemingway, and William Faulkner, as well as thousands of other books, articles, movies, songs, photographs, and artworks from the artistically productive 1920s and 30s. The owners of these copyrights will now be able to license and receive revenue from those copyrights for an additional twenty years. The public, conversely, will now have to wait an additional twenty years for these and all other works still under copyright to pass into the public domain.

This extension was merely the latest in a long line of congressional extensions of the copyright term. The term of protection under the original 1790 Act was fourteen years, with the possibility of renewal for another fourteen-year term, resulting in a potential total of twenty-eight years. The maximum possible term was lengthened in 1831 to forty-two years, then in 1909 to fifty-six years. And then, beginning in 1962, Congress embarked on a steady course of incremental extensions — nine separate times within twelve years — which expanded the maximum term from fifty-six to seventy years for subsisting
works. In the substantial revision of the Act in 1976, Congress extended the maximum possible term for existing works to seventy-five years. For future works, a new way of calculating the term replaced the prior fixed term: all future works would be protected for the life of the author plus fifty years. This change in the calculation of the term resulted in a dramatic extension of the copyright term. For example, a work created by an author in his thirties would have a copyright term of more than ninety years from publication, if the author lived to at least seventy. Finally, the latest extension occurred in 1998, when Congress passed the Bono Act and extended the copyright term to the life of the author plus seventy years.

Many of these extensions came under heavy attack from various academics and public interest groups, and the Bono Act was no exception. With respect to the extension for future works, commentators pointed out that any additional revenue created by an additional twenty years of protection more than fifty years after the death of the author was unlikely to lead to any appreciable increase in creative effort or activity, given the long period of time over which any revenues would have to be discounted. And even if some minimal degree of

45. These extensions were made in anticipation of the substantial 1976 revision of the Act.
51. See generally Statement of Copyright and Intellectual Property Law Professors in Opposition to H.R. 604, H.R. 2589, and S. 505 Submitted to the Committees on the Judiciary, U.S. Senate and U.S. House of Representatives, 105th Cong. (1998) (written testimony of Dennis Karjala), available at http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/legmats/1998Statement.html (last visited July 25, 2002) [hereinafter Karjala, Statement]; Bell, supra note 48; Christina N. Gifford, Note, The Sonny Bono Copyright Term Extension Act, 30 U. Mem. L. Rev. 363 (2000); Karjala, Website, supra note 24 (collecting materials submitted in opposition to term extension). Many of the arguments made both in support of, and against, the Sony Bono Copyright Term Extension Act were made a few years earlier, in the debate over the proposed 1995 Copyright Term Extension Act, which was not enacted. See The Copyright Term Extension Act, Hearings on S. 483 Before the Senate Judiciary Comm., 104th Cong., 1st Sess. (1995); Hearings on H.R. 989 Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary, 104th Cong., 1st Sess. (1995); Brownlee, supra note 4; Bryce, supra note 4; Hamilton, supra note 4; Jaszi, supra note 4; Patry, supra note 4; Reichman, supra note 4; Dixon, supra note 4; Lavigne, supra note 4. Because the two acts are so close in time and involved essentially the same arguments and opposing parties, I will treat arguments raised in both instances largely interchangeably.
52. See, e.g., Karjala, Statement, supra note 51.
incentive did exist for future works, such an added incentive could not be used to justify extension of the term for works that had already been created. That is, the works already exist, so the additional protection could not possibly have any impact on incentives to create them.53

Opponents of term extension also argued that the extension would impose substantial costs on the public by depriving it of freer access to copyrighted works.54 In the wake of the Bono Act, the public must now wait another twenty years before obtaining such access, even for works that had already been created.55 During this period, the public will continue to pay higher prices for those works.56 In addition, authors who wish to use such works as the basis for new creative works must expend effort and funds to license such uses from the copyright owners for an additional twenty years.57 Thus, to many opponents of term extension, the Act represented little more than a transfer of wealth from the public to existing copyright owners.58

Those supporting term extension responded by offering additional justifications for the extension, separate and apart from the incentive rationale set forth above.59 One justification was that incentives were needed to convert nondigital works into digital form and to preserve the digital copies given their fragile nature. That is, without additional years to exploit the work, no one would invest the effort necessary to

53. See, e.g., James Boyle, Cruel, Mean, or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property, 53 VAND. L. REV. 2007, 2036 (2000) ("Can you really explain the Sonny Bono Copyright Term Extension Act economically, perhaps as an attempt to offer incentives to the dead?"); Ginsburg, supra note 35, at 171 ("[I]t is important to emphasize that the traditional justification of copyright protection, as an incentive to the creation of works of authorship, simply does not apply to extension of the term of pre-existing works."); Travis, supra note 36, at 817-18. But see Hatch, supra note 7, at 736 (arguing that incentive impact results from the fact that existing authors, by receiving more revenue, are free to engage in other creative activities). But see Karjala, Statement, supra note 51 (debunking Hatch argument).

54. See BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 57-76 (disputing claim that extension is "costless"); Karjala, Statement, supra note 51, at 11 (documenting the various costs).

55. See Karjala, Statement, supra note 51.

56. See Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, Eldred v. Ashcroft, 122 S.Ct. 1170 (2002) (No. 01-618) [hereinafter Economists' Brief]; Karjala, Statement, supra note 51 (refuting claim that public domain status has no impact on prices); BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 64-65 (same).

57. See Ginsburg, supra note 35, at 171 (arguing that retroactive extension "cannot enhance the quantum of creativity from the past, but it can compromise the creativity of the future, by delaying for twenty years the time at which subsequent authors may freely build on these works").

58. See Karjala, Statement, supra note 51, at 5; Patry, supra note 4 (criticizing earlier bills that would have extended the term).}

59. See generally Hearings on H.R. 989 Before the Subcomm. on Courts & Intellectual Prop. of the House Judiciary Committee, 104th Cong. 355-56 (1996) (statements of Bruce Lehman and Marybeth Peters); Coble, supra note 7, at 296; Hatch, supra note 7, at 728; Miller, supra note 7, at 325.
preserve and digitize copyrighted works. A related argument, applicable to both digital and non-digital works, was that additional copyright protection was necessary to provide incentives for continuing distribution and promotion of existing works.

Yet another justification, and the one that ultimately appeared most persuasive to Congress, was based on the need to maintain a positive trade surplus by harmonizing the copyright term with the terms of European countries. The European Community ("EC") had instituted a rule that provided foreign works protection for the shorter of the EC term or the domestic term for the foreign country. Since the term for many works in European countries is life plus seventy years, many U.S. works under the earlier term would obtain twenty years less protection in Europe. U.S. companies would thus, the argument went, be operating under a disadvantage. This would have an unfavorable impact on our balance of trade, since the United States is a net exporter of copyrighted works.

Opponents of term extension countered by arguing that these additional justifications were extremely weak and certainly not sufficient to outweigh the substantial costs imposed by term extension. First, opponents of term extension pointed out that there was no indication or evidence that the existing copyright term was insufficient to provide the incentives needed to digitize and preserve copyrighted works, or

60. See Coble, supra note 7, at 296; Hatch, supra note 7, at 728; Miller, supra note 7, at 325. Proponents of the extension also argued that the extension was warranted due to the desire to provide a return for an author's descendants and increasing life expectancy. See Hatch, supra note 7, at 732. But see BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 145-47; William Patry, The Failure of the American Copyright System: Protecting the Idle Rich, 72 NOTRE DAME L. REV. 907, 931 (1997) [hereinafter Patry, Failure] (arguing that this argument is "internally contradictory. While it is true that a longer lifespan means that grandchildren of the author will live longer, it also means that the author will live longer and, therefore, will be able to provide for his or her grandchildren for an equally longer period").


that extending protection would increase such incentives.\(^{65}\) Indeed, there was evidence suggesting just the opposite, that is, that continued protection of works would in fact hinder such preservation efforts.\(^{66}\) Specifically, a number of entities had been engaged in digitizing and making available on the Internet copies of works that had passed into the public domain.\(^{67}\) By extending the term of protection, Congress significantly hindered these ongoing attempts to digitize existing works. Similarly, commentators questioned whether incentives were necessary to ensure continuing distribution of already existing works, particularly since such incentives are generally not necessary in other non-copyright markets.\(^{68}\)

Opponents also questioned the desirability of harmonization with the terms of European countries and argued that, even if harmonization were desirable, the Bono Act did not in fact address the issue.\(^{69}\) As an initial matter, opponents argued that harmonization in the abstract was not a satisfactory reason in itself without some understanding of the costs and benefits of harmonization.\(^{70}\) Moreover, the extension would not in fact truly harmonize protection, since other term\(^{71}\) and non-term features of European copyright protection

\(^{65}\) See Travis, supra note 36, at 830 ("The wide availability of the works of Shakespeare demonstrates that public domain works need not fall into obscurity.").


\(^{67}\) See id.

\(^{68}\) BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 66 ("One of the errors in this line of thinking is the assumption that the same policy imperative that applies at the time of initial creation and dissemination also applies at later times ... [O]nce the work has been created and a time sufficient to recoup investment has passed, there is no more reason to assume a call for monopoly profits or subsidy here than with any other product."). But see Landes & Posner, Indefinitely Renewable Copyright, supra note 61 (suggesting reasons why copyright markets might be different).

\(^{69}\) See generally BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 191-214.

\(^{70}\) See Karjala, Statement, supra note 51; BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4; Kenneth D. Crews, Harmonization and the Goals of Copyright: Property Rights or Cultural Progress?, 6 IND. J. GLOBAL LEGAL STUD. 117, 135-38 (1998) (critically analyzing congressional reliance on harmonization as a rationale for changes to the copyright act); Jaszi, supra note 4, at 304; Patry, Failure, supra note 60, at 930 (arguing that harmonization-based arguments for term extension are "entirely post hoc"); Reichman, supra note 4, at 626, 639 (arguing that the proposed 1995 extension "cannot be justified in terms of a drive for harmonization as such"); Jerome Epping, Jr., Comment, Harmonizing the United States and European Community Copyright Terms: Needed Adjustment or Money for Nothing?, 65 U. CIN. L. REV. 183 (1996) (analyzing the extent to which term extension would in fact harmonize protection).

\(^{71}\) Indeed, for certain categories of works such as sound recordings and works created by corporate entities, the extended U.S. term would provide more protection than that given to similar works in Europe. See, e.g., Patry, Failure, supra note 60, at 928-30. For example,
regimes result in substantial differences in the treatment of copyrighted works, and these differences greatly outweigh the impact of the copyright term. Finally, even if the Act did harmonize the scope of protection, there was no evidence that lack of harmonization would have any impact whatsoever on the U.S. trade balance.

In the end, Congress passed the term extension, despite the fact that the substantive policy arguments supporting term extension were not terribly compelling. Although prospective extension of the term could theoretically provide some minimal degree of additional incentive for creative activity, in practice, the added incentive is trivial. Moreover, retroactive extension can find no reasonable incentive-based justification. And the alternative justifications proffered by Congress, though facially plausible, were extremely weak, particularly in light of the costs imposed by the extension. Indeed, the weakness of the arguments in support of term extension is reflected in the fact that the extension was opposed by an unusually wide array of copyright scholars, including many who normally favor broader protection.

Given the lack of strong policy support for term extension, Congress's passage of the Bono Act can ultimately best be understood as resulting, in large part, from the lobbying efforts of the copyright industries (for example, film, music, publishing, software) which had much to gain from an extension, particularly a retroactive one. Companies, such as Disney, with valuable copyrights that were slated to expire within the next twenty years lobbied aggressively for the extension. These companies had much to gain from retroactive extension of their copyrights, since extension permitted them to protect and ex-

the European countries that recognize corporate authorship give such authors a term of 70 years, while the Bono Act gives similar authors a term of 95 years. See Karjala, Statement, supra note 51 (providing many other examples where the Bono Act would result in different terms of protection).

72. See Karjala, Statement, supra note 51; Netanel, supra note 9, at 74-75; see also Ginsburg, supra note 35, at 172-73.

73. See Karjala, Statement, supra note 51.

74. See Bard & Kurlantzick, Millennium, supra note 4, at 61 ("What is striking about the arguments offered by proponents of a lengthened copyright term is their lack of substance. Virtually none of the reasons put forth for change have even a modicum of intellectual merit.").

75. See Karjala, Statement, supra note 51 (listing signatories); Symposium, supra note 63, at 698-702 (statement by Jane Ginsburg).

ploit their copyrights for an additional twenty years. At the same time, the public interest groups and commentators who opposed the extension had no similar lobbying power.\footnote{See Bard & Kurlantzick, Copyright Duration, supra note 4.} And certainly the public at large was not sufficiently exercised about a topic as abstract as copyright term extension to exert any meaningful pressure on Congress to resist industry calls for extension. Thus it is perhaps not surprising that the extension was passed, despite the lack of strong policy justifications in its support.

\section*{B. Initial Responses to Term Extension}

Concerned about the negative effects of copyright term extension and Congress's apparent inability to resist calls for expansion from the copyright industries, opponents of term extension turned to constitutional challenges. In \textit{Eldred v. Ashcroft},\footnote{Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001), \textit{cert. granted sub nom.} Eldred v. Ashcroft, 122 S. Ct. 1062 (2002). I should disclose that I signed an amicus brief in \textit{Eldred}, arguing that the retroactive portions of the term extension act are unconstitutional. Brief of Intellectual Property Law Professors as Amici Curiae Supporting Petitioners, Eldred v. Ashcroft, 122 S. Ct. 1170 (2002) (No. 01-618).} a number of parties brought a declaratory judgment action arguing, among other things, that Congress had exceeded the scope of the grant in the Constitution's Copyright Clause. Specifically, the plaintiffs argued that the retroactive application of the extension did not "promote the Progress of Science and useful Arts," since there could be no justification for trying to increase incentives for existing works. Moreover, Congress's repeated prospective extensions violated the "limited Times" language of the Copyright Clause by effectively extending the term indefinitely.\footnote{See id. The plaintiffs also initially argued that retroactive extension violated the Copyright Clause's originality requirement. \textit{Id.}} Plaintiffs also argued that the term extension violated the First Amendment.\footnote{Id.}

The plaintiffs lost both before the D.C. District Court\footnote{Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001).} and the U.S. Court of Appeals for the D.C. Circuit.\footnote{See id. at 377-78.} The majority opinion for the D.C. Circuit panel rejected the argument that Congress had exceeded the scope of the Constitution's Copyright Clause by extending the term retroactively. The Court refused to construe the preamble of the Copyright Clause — "To promote the Progress of Science and useful Arts" — as a substantive limitation on Congress's power.\footnote{See id. Moreover, even if the preamble were a substantive limit, the court said the}
government's proffered justifications (that is, a need to provide incentives to preserve existing works, the need to harmonize the U.S. copyright term with European terms, the need to preserve the United States' balance of trade) were sufficient to "promote Progress" when evaluated with proper deference to Congress's judgment. The Court rejected additional arguments based on the First Amendment, holding that the idea/expression dichotomy in copyright law and the existence of a fair use defense were sufficient to protect any First Amendment interests implicated by the extension. In dissent, Judge Sentelle argued that Congress had exceeded the scope of its authority under the Copyright Clause because the extension did not "promote the Progress of Science and useful Arts," and because the continual succession of extensions violated the "limited Times" language of the clause.

The D.C. Circuit denied the petition for rehearing en banc (over a two-judge dissent). The plaintiffs filed a petition for certiorari to the Supreme Court, which the Court granted. The case was heard by the Supreme Court on October 9, 2002, and an opinion has yet to be issued, as of the date of this writing.

The arguments raised in Eldred echoed similar arguments found in the academic literature. Indeed the copyright term extension, along
with a number of other recent legislative expansions of copyright protection, have spawned a rich literature examining the potential limits on Congress's power to expand copyright protection. Some commentators have argued that recent Congressional expansions, particularly the retroactive extension of the copyright term, violate internal limits imposed by the Constitution's intellectual property clause. Others have argued that such expansions may violate external limits imposed by the First Amendment. In all, a generous amount of scholarship has been produced analyzing the term extension, much of it concluding that the extension, at least the retroactive aspect of it, is constitutionally problematic.

There are limits, however, on the extent to which constitutional arguments can effectively address the many issues raised by term extension and the long period of copyright protection more generally. True, some of these constitutional arguments are reasonably strong. For example, the argument against retroactive term extension quite possibly could be adopted by the Supreme Court in *Eldred*. The constitutional case against prospective extension of the copyright term, however, is far weaker. Moreover, even if the Supreme Court were to strike down both the retrospective and prospective aspects of the most recent term extension, it would still leave intact the extremely long existing term of copyright protection.

Thus, regardless of how the Supreme Court ultimately decides the constitutional issue, many of the effects of a lengthy term will still be

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91. See, e.g., Heald & Sherry, *supra* note 9; Patterson, *Understanding*, *supra* note 90; Walterscheid, *supra* note 90.


93. Another case has also been filed in another circuit, with similar facts. See Golan v. Ashcroft, Civ. No. 01-B-1854 (D. Colo. filed 2001), available at http://llr.lls.edu.

94. Of course, if retroactive extension is ruled unconstitutional, the incentive to lobby for future prospective extensions will be effectively eliminated, since those lobbying for such extensions are primarily concerned with gaining additional protection for existing copyrighted works. The benefits from purely prospective term extension are so remote that they would not justify the expenditure of any current funds for lobbying purposes. See infra Section II.A. This is one of the tactical reasons supporting the retroactive attack in particular. Elimination of retroactive term extension, however, would not address the current prospective extension nor, more generally, the already-too-long copyright term.

95. It is true that such a decision might well call into question the constitutionality of prior copyright term extensions, and a subsequent lawsuit could well result in a judicial decision striking down prior extensions. At this point, however, such a situation is rather speculative, particularly given the different context and justifications for prior extensions (for example, compliance with the Berne Convention). And either way, the term of copyright protection will still be quite long.
felt whether or not future extensions are permitted. Direct attacks on term extension have little to say about what impact the existing length of the term should have on the scope of copyright protection more generally. That is, by focusing so narrowly on the end of the copyright term, these constitutional arguments do not address the broader question of how the passage of time might affect copyright interests during the lengthy existing copyright term. A constitutional challenge is thus a rather blunt, though important, tool for addressing concerns about the length of copyright protection.

C. The Proposal — An Overview

Given that direct constitutional challenges to term extension do not appear to fully address the issues raised by term extension, and given that political pressure on the elected branches is more likely to result in a longer rather than shorter copyright term, are there any other means within existing doctrine to reduce the ill-effects of the term extension? That is, are there less dramatic ways for courts to incorporate some of the concerns raised by the opponents of term extension into the existing structure and doctrine of copyright law?

I believe that the answer is yes. Indeed, I believe that existing copyright law doctrines provide courts with the tools not only to mitigate some of the ill-effects of the recent term extension, but also, more broadly, to arrive at a much more well-balanced and finely-tuned understanding of copyright scope, one that for the first time recognizes and takes account of the vast modern expansion of the copyright term and its impact on the policies underlying copyright law. Which leads me to my proposal.

The proposal is simple: in deciding whether a given use of a copyrighted work is fair use, courts should take into account how much time has passed since the work was created. The more recent the work, all other things being equal, the narrower the scope of fair use; the older the work, the greater the scope of fair use. So, for example, a book written seventy years ago should be subject to a greater degree of fair use than a book written yesterday. The ability to make sequels, to copy portions of the work, to comment upon it, to transform and rework it, should be greater than the similar ability to make fair use of a book written only two years ago.


97. See also BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 139 n.192 ("The doctrine of fair use, though, may be seen as a device which, on an ad hoc basis, can modulate protection so as to bring it closer to the optimum . . . ."); Hughes, Fair Use, supra note 10 (proposing that courts consider how much copyright protection remains, when deciding fair use cases); Note, supra note 10, at 1209 (proposing that courts consider both time and the size of the author's reward in deciding whether the re-writing of another author's literary work constitutes fair use).
Courts would implement this proposal rather straightforwardly under existing copyright doctrine. The fair use defense in copyright law is a flexible defense, designed to ensure that the entitlements granted to authors not inadvertently hinder copyright's overall purpose of encouraging widespread dissemination of creative works. The defense privileges certain uses of copyrighted works for purposes of comment, criticism, education, research, and news reporting, even if such uses would otherwise be technically infringing. In assessing whether a use is fair, courts consider four statutory factors: the purpose and character of the use, the nature of the copyrighted work, the amount of the original work used, and the effect of the use upon the potential market for the work.

Under the proposal in this Article, courts would simply consider time as an additional factor in fair use analysis. Although the copyright act lists only four factors, the text of the statute and its legislative history clearly indicate that these factors are not meant to be exclusive. Instead, courts are meant to apply fair use in a flexible manner, and indeed courts have considered many additional factors in deciding fair use cases. Consideration of time as an additional factor would thus fit rather easily within existing doctrine. For older works, this additional factor would weigh in favor of fair use, while for younger works this factor would weigh against fair use. There would thus be more "breathing space" for others to use, copy, transform, and comment upon older works.

To be clear, consideration of time in fair use analysis would not be dispositive. Nor would the proposal here eliminate copyright protection for older works. Rather, time would be a factor to be weighed along with (and in some cases outweighed by) the other fair use factors. Older works would still enjoy substantial protection under copyright law, for example, against direct, commercial copying. However, older works would have less protection against uses of the work that involve traditionally fair uses. Thus, Mickey Mouse would still have substantial protection against literal commercial copying, even though he first appeared more than seventy years ago. However,

99. Id.
100. See infra Section III.A.
101. Id.
102. Id.
103. I describe this in much more detail (along with concrete examples) infra Section IV.A.
104. See Steamboat Willie (Walt Disney 1928).
Mickey would be exposed to a greater degree of other critical, transformative, and derivative uses.\(^{105}\)

In advancing this proposal, let me be clear about my motives. Like many other commentators, I am troubled by the continuing expansion of copyright protection on a number of different fronts. Specifically, I believe that many of these expansions find little or no support under any of the policy justifications underlying copyright law. At the same time, the prospect of congressional action in this arena is unlikely, given the structural imbalances in lobbying power. And constitutional challenges to congressional action are an incomplete solution, even if successful. Thus, this proposal is quite consciously an attempt to look for ways within existing doctrine for courts to legitimately inject certain public-regarding values into the scope of copyright protection.\(^{106}\)

For those who share this view, this proposal should be very attractive. But even for those who do not share this view, the proposal should be attractive since it stands very much on its own two feet. That is, although the proposal in this Article was inspired by the perceived ill-effects of term extension, it turns out that the proposal has beneficial effects and implications for copyright law more generally, beyond the narrow issue of term extension. As I will show, the proposal finds very strong support under virtually all of the underlying justifications for copyright law. It provides a more finely-calibrated balance between access and incentives, it encourages an appropriate amount of re-use and adaptation of existing works, and it provides more measured

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105. For purposes of simplification, I refer here, and elsewhere, to the characters themselves, as opposed to the underlying creative works in which they first appeared. Copyright law provides some level of protection for fictional characters that are sufficiently delineated, although the precise scope and extent of such protection is not completely clear. See, e.g., D.C. Comics Inc. v. Reel Fantasy, Inc., 696 F.2d 24 (2d Cir. 1982); Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930); 1 GOLDSTEIN, supra note 5, § 2.7.2.

106. This proposal is thus likely what Jane Ginsburg was concerned about in writing that: “One unintended consequence of term extension, I fear, is to promote contentions that the only way to offset the excessive term of copyright is to cut back on the scope of copyright — to establish weaker derivative works protection or weaker protection across the board.” See Symposium, supra note 63, at 701. Others have suggested more generally that courts should interpret fair use expansively in light of extensions in the copyright term. See, e.g., Lydia Pallas Loren, Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems, 5 J. INTELL. PROP. L. 1, 7 (1997) (“Under the current scheme of copyright, granting ever broader rights to copyright holders for ever longer periods of time, the guarantee of the right of fair use must be protected and even expanded.”); see also Jessica Litman, Copyright and Information Policy, 55 LAW & CONTEMP. PROBS., Spring 1992, at 185 n.2, 207 (1992); Maureen A. O’Rourke, Evaluating Mistakes in Intellectual Property Law: Configuring the System to Account for Imperfection, 4 J. SMALL & EMERGING BUS. L. J. 167 (2000) (arguing that courts interpreting intellectual property statutes can play a role in compensating for imperfections in the legislative process); cf. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 114 (1967) (“It is evident that as rights are strengthened, they need run, and can be endured, only for a correspondingly shorter period.”); Richard Gilbert & Carl Shapiro, Optimal Patent Length and Breadth, 21 RAND. J. ECON. 106 (1990) (discussing the interaction of length and breadth of protection in the patent context).
rewards to authors for their creative labor. These are all good reasons, within existing copyright law theory, to support the proposal. Thus, whatever one thinks about recent expansions in copyright protection, the proposal advanced in this Article will have significant benefits for copyright law generally.

II. THEORETICAL ARGUMENTS

Before examining the doctrinal argument in support of my proposal, I want to establish the reason to construct it in the first place — that is, that time should matter in fair use analysis. As it turns out, an examination of a number of policy justifications underlying copyright law reveals that there is extremely strong support for considering time in setting the proper scope of copyright protection. Indeed, the support is so strong that it is surprising that courts have yet to explicitly vary the scope of copyright protection over time, particularly given the vast current term of copyright protection.

A. Incentives and Access

The primary policy justification for copyright protection in the United States is the incentive justification. The familiar argument goes like this: copyright protection is necessary to provide adequate incentives for authors to engage in creative activity. Without such protection, others could easily copy and distribute an author’s works, quickly driving the price of the work down to the marginal cost of producing an additional copy. Authors would thus be unable to recoup the costs of their original creative labor. As a result, authors would not choose to engage in such labor in the first place, and creative works would not be produced in adequate numbers. Copyright law solves this problem by providing incentives to engage in creative labor, thereby harnessing the economic self-interest of authors to the benefit of society at large.


108. But see Breyer, supra note 50 (arguing that this may not be the case in the market for books, in light of first-mover advantages and other factors). See also Barry W. Tyerman The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer, 18 UCLA L. REV. 1100 (1981) (disputing Breyer’s claims). See generally BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 26 n.32 (discussing non-monetary incentives more generally).

109. The term “adequate” here is deliberately fuzzy, as much disagreement exists over what is adequate.
At first blush, the incentive argument would appear to justify further extension of the copyright term. After all, if some incentive is good, why isn't more incentive even better? The familiar answer is that protection comes at a cost. Copyright law provides incentives to authors, but only by enabling authors to restrict dissemination of the work. In economic terms, copyright law permits an author to raise the price of the work above the marginal cost of producing an additional copy. This provides an incentive to the author, but it also means that those who would have purchased the copy at or above the marginal cost but below the higher price cannot get access to the work. Copyright law thus presents a trade-off. Roughly speaking, depending on the strength of the protection, we can have more works with more restricted access, or fewer works with broader access.

110. This is true at least with respect to future works. As noted earlier, this justification cannot reasonably be applied to works that have already been created.

111. See 1 T.B. MACAULAY, MACAULAY'S SPEECHES AND POEMS 285 (A.C. Armstrong & Son 1874) ("It is good that authors should be remunerated; and the least exceptional way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.").

112. This is the deadweight or static efficiency loss. See, e.g., Economists' Brief, supra note 56, at 10-12; William W. Fisher III, Reconstructing the Fair Use Doctrine, 101 HARV. L. REV. 1659 (1988); Richard J. Gilbert & Michael L. Katz, When Good Value Chains Go Bad: The Economics of Indirect Liability for Copyright Infringement, 52 HASTINGS L.J. 961, 963-64 (2001); Netanel, supra note 107.

113. See ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 135 (1988) ("[T]he dilemma is that without a legal monopoly not enough information will be produced but with the legal monopoly too little of the information will be used."); Glynn S. Lunney, Jr., Reexamining Copyright's Incentives-Access Paradigm, 49 VAND. L. REV. 483 (1996).

114. Some commentators have argued that this loss can be avoided if the author can engage in price discrimination. See, e.g., Tom W. Bell, Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine, 76 N.C. L. REV. 557, 596-600 (1998); Trotter Hardy, Property (and Copyright) in Cyberspace, 1996 U. CHI. LEGAL F. 217; see also Harold Demsetz, The Private Production of Public Goods, 13 J.L. & ECON. 293 (1970); William W. Fisher III, Property and Contract on the Internet, 73 CHI.-KENT L. REV. 1203, 1234-40 (1998); Fisher, supra note 112. Thus, for some (that is, so-called "maximalists" or "neoclassicists"), an optimal term might be perpetual, assuming that the Constitution did not foreclose this option. See Netanel, supra note 107, at 367-68 ("Neoclassicism, therefore, has no reason to extinguish the owner's copyright after a term of years."). It isn't clear to me, however, that the conditions that would permit perfect (or even close to perfect) price discrimination exist in real copyright markets. See, e.g., CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 53 (1999); Ben Depoorter & Francisco Parisi, Fair Use and Copyright Protection: A Price Theory Explanation, 21 INT. REV. L. & ECON. 453 (2002); Joseph P. Liu, Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership, 42 WM. & MARY L. REV. 1245, 1321-22 (2001); Michael J. Meurer, Copyright Law and Price Discrimination, 23 CARDOZO L. REV. 55 (2001). Moreover even if they did, other more fundamental objections (including the one in the following paragraph) exist to this price discrimination model. See, e.g., Yochai Benkler, An Unhurried View of Private Ordering in Information Transactions, 53 VAND. L. REV. 2063 (2000); Boyle, supra note 53; Julie E. Cohen, Copyright and the Perfect Curve, 53 VAND. L. REV. 1799 (2000); Julie E. Cohen, Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management," 97 MICH. L. REV. 462 (1998); Wendy J. Gordon, Intellectual Property
Copyright law also presents another trade-off, this one not between authors and consumers, but between authors and other authors. It is a commonplace that new works draw from and build upon old ones.\textsuperscript{115} No work is purely and completely new. All works draw upon prior works, to at least some extent. Thus, by increasing protection for initial works, we may increase the incentives for producing such works, but we also increase the cost of producing works that draw upon these initial works.\textsuperscript{116} If protection is too great, we may in fact decrease the number of total works (that is, the sum of both original and follow-on works). If our aim is to provide adequate incentives for both initial and follow-on works, the strength of copyright protection needs to reflect this balance.\textsuperscript{117}

The length of the copyright term is one way (among many ways) in which this balance is struck.\textsuperscript{118} Too short a term, and the incentives may not be sufficient to spur initial creation, since authors may not have enough time to obtain sufficient compensation for their efforts. Too long a term, and the work may not be widely disseminated or built upon over time.\textsuperscript{119} The optimal or ideal copyright term is probably impossible to determine in any meaningful way.\textsuperscript{120} Indeed, the aca-

\textsuperscript{115} See, e.g., Paul Goldstein, Derivative Rights and Derivative Works in Copyright, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 218 (1983); Peter Jaszi, Toward a Theory of Copyright: The Metamorphosis of "Authorship," 1991 DUKE L.J. 455, 457-63; Litman, supra note 30, at 966-67 ("But the very act of authorship in any medium is more akin to translation and recombi-
nation than it is to creating Aphrodite from the foam of the sea.").


\textsuperscript{117} See Landes & Posner, Economic Analysis, supra note 107; Mark Lemley, The Economics of Improvement in Intellectual Property Law, 75 TEXAS L. REV. 989 (1997); Netanel, supra note 107, at 295 ("An overly expanded copyright also constitutes a material disincen-
tive to the production and dissemination of creative, transformative uses of preexisting ex-
pression.").

\textsuperscript{118} See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

\textsuperscript{119} See Walterscheid, supra note 90, at 359 (discussing this balance). But see Landes & Posner, Indefinitely Renewable Copyright, supra note 61 (proposing a regime in which copy-
rights could be repeatedly renewed).

\textsuperscript{120} See H.R. REP. NO. 94-1476 (1976), at 133, reprinted in 1976 U.S.C.C.A.N. 5659, 5749 ("The debate over how long a copyright should last is as old as the oldest copyright statute and will doubtless continue as long as there is a copyright law."); Netanel, supra note 107, at 369 ("[l]t is difficult, if not impossible, to determine with any degree of precision the term of copyright that would lead to optimum support for creative autonomy, while still al-
lowing for sufficient user access.").
demic literature on this point has provided no firm guidance. Differ­
ent types of works may require different lengths of protection (for ex-
ample, protecting software for ten years would probably be sufficient,
at least under today's market conditions, given how quickly software
becomes obsolete). Even within a given category of work, much
might depend on how the market is structured at that particular time,
what other incentives exist, etc. Thus, a high degree of uncertainty will
inevitably attend discussions about the proper term. The precise num­
ber chosen will always be, to some extent, arbitrary. Thus Congress
should properly be given some degree of discretion in setting the
term.

Even conceding a good degree of Congressional discretion, how­
ever, there are good reasons to believe that the current period is too
long, i.e. that it substantially hinders access without a corresponding
benefit in incentives. Under an incentive justification, the reason for
the copyright extension is that it will increase the incentives for the

121. See BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4; Saul Cohen,
Duration, 24 UCLA L. REV. 1180 (1977); Richard A. Epstein, Intellectual Property: Old
Boundaries and New Frontiers, 76 IND. L.J. 803, 825 (2001) (discussing duration); Landes &
Posner, Economic Analysis, supra note 107; Landes & Posner, Indefinitely Renewable Copy­
right, supra note 61; Walterscheid, supra note 90, at 359-60; Edward C. Walterscheid, The
Remarkable — And Irrational — Disparity Between the Patent Term and the Copyright Term,
83 J. PAT. & TRADEMARK OFF. SOC'Y 233 (2001); see also JAMES BOYLE, SHAMANS,
SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY
172 (1996) (suggesting a twenty-year term); LAWRENCE LESSIG, THE FUTURE OF IDEAS:
THE FATE OF THE COMMONS IN A CONNECTED WORLD 251 (2001) (proposing a series of
renewable 5-year terms). Similar literature exists regarding the optimal patent term (with
similarly little in the way of firm guidance). See, e.g., WILLIAM D. NORDHAUS, INVENTION,
INVENTION, GROWTH, AND WELFARE: A THEORETICAL TREATMENT OF TECHNOLOGICAL CHANGE
76-86 (1969); Gilbert & Shapiro, supra note 106; Paul Klemperer, How Broad Should the

122. See BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 137 n.192;
RALPH S. BROWN & ROBERT C. DENICOLA, CASES ON COPYRIGHT, UNFAIR
COMPETITION, AND RELATED TOPICS BEARING ON THE PROTECTION OF LITERARY,
MUSICAL, AND ARTISTIC WORKS 487 (7th ed. 1998) (suggesting possibility of varying terms
depending on nature of the work).

123. The discussion here focuses on how long the copyright term should be as a matter
of theory. For a historical explanation for the copyright term, see Walterscheid, supra note
90, at 381-86.

however, that such discretion also provides a strong incentive for interested parties to peti­
tion for extensions of the time period. See infra Section II.D.

125. See Symposium, supra note 63, at 677 (comments by Wendy Gordon) (suggesting
that "an instrumentalist would oppose the extension [because] [i]t provides twenty more
years of making works expensive and difficult to access, without giving a compensating gain
in incentives"); William M. Landes, Copyright, Borrowed Images, and Appropriation Art: An
Economic Approach, 9 GEO. MASON L. REV. 1 (2001) (calling the current long duration of
copyright "a major economic puzzle" and rejecting proffered explanations as implausible);
Lloyd L. Weinreb, Copyright for Functional Expression, 111 HARV. L. REV. 1149, 1244
(1998) ("It is scarcely credible that authors' or publishers' decisions, say, in 1998 will be af­
fected by rights that their successors will have in 2073 and thereafter.").
creation of new works. As a matter of simple economics, however, additional increases in the copyright term result in ever-decreasing amounts of additional incentive. For the vast majority of works, there will be little demand more than fifty years after the death of the author.\textsuperscript{126} Even for those few works that still retain some market value, the present value of any future income streams will be minuscule. This is because of the simple economic phenomenon of the time value of money.\textsuperscript{127}

To see this, take the following example.\textsuperscript{128} Assume, for simplicity's sake, that an author creates a work in 2000 at age forty and dies in the year 2030 at age seventy. The term of protection under the 1976 Act would have been until the year 2080. Under the term extension, however, the term will now expire in 2100. What was the incentive value of that additional twenty years? Let's assume a discount rate of ten percent. Let's further assume that the author is one of the very fortunate few whose work is still generating some revenue for his estate from 2081 through 2100. If the work generated one dollar each year for the period from 2081 through 2100, the net present value of that cash flow would be about 0.42 cents, or just under half a penny.\textsuperscript{129} If the work is

\textsuperscript{126} See GOLDSTEIN, supra note 5 ("According to the 1961 Report of the Register of Copyrights, fewer than fifteen percent of all copyrights were renewed under the 1909 Act.").

\textsuperscript{127} See Affidavit of Hal R. Varian ¶ 3, Eldred v. Reno, 74 F. Supp. 2d 1 (D.D.C. 1999) (No. 99-0065) [hereinafter Varian Affidavit] ("In my opinion, extending current copyright terms by 20 years for new works has a tiny effect on the present value of cash flows from creative works and will therefore have an insignificant effect on the incentives to produce such works.") available at http://cyber.law.harvard.edu/eldredvreno/varian.pdf (last visited Feb. 1, 2002); Economists' Brief, supra note 56; BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 60; RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW 46-47 (5th ed. 1998) ("[A]s a result of discounting to present value, the knowledge that you may be entitled to a royalty on your book 50 to 100 years after you publish it is unlikely to affect your behavior today.") (internal citation omitted); Breyer, supra note 50, at 324 ("More probably authors, like others, discount the value of future income, and, when discounted, the present value of a future copyright advantage is small."); Robert C. Denicola, Freedom to Copy, 108 YALE L.J. 1661, 1679 (1999) ("At some point, attempts to defend increased duration on incentive grounds become implausible because of the decreasing time value of money."); Merges, supra note 76, at 2236-37 ("From an incentive point of view, the Act is virtually worthless; viewed from a present-value perspective, the additional incentive to create a copyrightable work is negligible for an extension of copyright from life-plus-fifty years to life-plus-seventy years."). Indeed, this very basic point was recognized as early as 150 years ago by Macaulay: [A]n advantage that is to be enjoyed more than half a century after we are dead, by somebody, we know not by whom, perhaps by somebody unborn, by somebody utterly unconnected with us, is really no motive at all to action." See 1 MACAULAY, supra note 111, at 286, quoted in Zechariah Chafee, Reflections on the Law of Copyright: II, 45 COLUM. L. REV. 719 (1945).

\textsuperscript{128} This example is adapted from Economists' Brief, supra note 56, and Varian Affidavit, supra note 127. For similar calculations, see Karjala, Statement, supra note 51, at 23; Landes & Posner, Indefinitely Renewable Copyright, supra note 61.

\textsuperscript{129} The present value of a future payment of $1 is $1/(1+r)^n$, where $r$ is the discount rate and $n$ is the number of years in the future when the payment is made. See Varian Affidavit, supra note 127. The 0.42-cent figure is simply the sum of the present values for $1 payments from years 2081 through 2100.
successful, generating say $100,000 per year even that far out into the future, the present value of that cash flow would be approximately $420.

Moreover, we have assumed, unrealistically, that the return is absolutely certain. If we instead discount that amount further by the uncertainty associated with receiving any revenue eighty years later, the amount would be even less. If, for example, only one percent\textsuperscript{130} of published novels have any kind of staying power fifty years later, the expected value would be $4.20. Thus, in order to accept the incentive justification, one would need to believe that the prospect of an additional $4.20 to the author in 2000 would be sufficient to result in an appreciable increase in creative effort.\textsuperscript{131}

Yet one needn’t accept this argument, or even believe that the current period is too long, to accept the argument that time should at least have some impact on the level of protection. That is because, if we accept the incentive argument for copyright protection, the value of the additional incentive to the author decreases the further out we go on the copyright term. This is again the result of the time value of money. Revenue from the first ten years of protection is more valuable than revenue from the next (assuming the amounts of revenue are the same), because the revenue from the next ten years is subject to a greater period of discounting.\textsuperscript{132} And so on. Thus, the present value, and therefore incentive impact, of revenue in the last twenty years of a copyright’s term is far less than the first. In the example above, assuming the same revenue received in the first twenty years, the net present value of that cash flow, even prior to discounting to account for the probability of continued success, would be more than $850,000 compared to $420 from the last twenty years. The incentive

\textsuperscript{130} This figure is likely generous. Rates of copyright renewal under the pre-1976 regime are an indicator of the economic value of copyrighted works over time. These renewal rates suggest that the vast majority of works did not have sufficient value to warrant even the minimal cost of renewal, even twenty-eight years after publication. See 1 GOLDSTEIN, supra note 5 (“According to the 1961 Report of the Register of Copyrights, fewer than fifteen percent of all copyrights were renewed under the 1909 Act.”); Barbara A. Ringer, Renewal of Copyright, in 1 STUDIES ON COPYRIGHT 503, 617 (Copyright Society of the U.S.A. ed., 1963); see also Landes & Posner, Indefinitely Renewable Copyright, supra note 61, at 22-28 (empirical study of copyright renewal rates indicating that fewer than eleven percent of copyrights registered from 1883 to 1964 were renewed, and concluding that “copyrights are subject to significant depreciation and have an expected or average life of only about 15 years”); id. at 28 (estimating that “fewer than 1 in 750 works registered in 1934 will have commercial value in 2030”).

\textsuperscript{131} This analysis is, admittedly, simplified. To get a truly accurate picture of the incentives involved, one would need to have more concrete data on the range of different possible income streams for various types of works, and the likelihood of each income stream in fact occurring, etc. However, the analysis does at least give a rough impression of how time impacts the value of income streams that far in the future.

impact of the last twenty years is thus 0.049% of the incentive impact of the first twenty years. And again, even this understates the differential, since it does not adjust for the very likely possibility that revenue streams would significantly be reduced (perhaps to nothing) as the work becomes older. Accordingly, under the incentive view, the further out we go in the term, the less we should be concerned about the incentive effects of finding no or less protection.

Conversely, there may be quite strong reasons to be concerned about ensuring widespread access over time. The more time that elapses from creation, the more difficult it will be for a potential purchaser or licensor to determine who owns the copyright. The problems associated with finding the holders of copyrights have been well-documented. In some cases, a work may no longer be published. In other cases, difficulties may result because the original author is deceased, and the heirs or devisees need to be identified and contacted. Alternatively, the more time has passed, the more likely it is that the copyright has been transferred to other parties, perhaps several times,

133. To see how quickly the incentive effect falls off, consider the present value of $100,000 annual cashflows for the following periods: 2001-2020: $851,356; 2021-2040: $126,549; 2041-2060: $18,811; 2061-2080: $2,796; 2081-2100: $416. As a percentage of the total return over the entire 100-year period, the figures are: 2001-2020: 85.14%; 2021-2040: 12.66%; 2041-2060: 1.88%; 2061-2080: 0.28%; 2081-2100: 0.042%.

134. Justin Hughes identifies, and primarily bases his similar proposal upon, another way in which concerns about incentives are less important near the end of the copyright term. Focusing specifically on more minor uses which could cause harm if they became more widespread (such as personal copying), Hughes notes that the aggregate market harm from such uses is necessarily less if they arise late in the copyright term because there is a shorter period of remaining time during which the harm will be felt. See Hughes, Fair Use, supra note 10.

135. Note that this holds true even under theories of copyright law that argue that the incentive impact results, not necessarily from the return from any given work, but from the potential of ever creating a work that generates an exceptional amount of revenue. See, e.g., Kenneth W. Dam, Some Economic Considerations in the Intellectual Property Protection of Software, 24 J. LEGAL STUD. 321, 350-51 (1995). Even under this view, the future revenues from a “hit” must be discounted over the lengthy copyright term. Similarly, the analysis applies as well to arguments sometimes made that extension of the copyright term is intended to benefit an author’s descendants, since the amount of this benefit is subject to discounting as well. See Ginsburg, supra note 35, at 172 (“The 1976 Act term already allowed authors to provide for children and grandchildren; will the addition of great-grandchildren to the prospective beneficiaries of the author’s work likely inspire the creation of another song or sequel?”).

136. See ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 125 (2d ed. 1997) (discussing tracing costs); Landes & Posner, Economic Analysis, supra note 107, at 361.

137. See BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 57-58; see also, e.g., Frances M. Nevins, Little Copyright Dispute on the Prairie: Unbumping the Will of Laura Ingalls Wilder, 44 ST. LOUIS U. L.J. 919 (2000) (documenting dispute over copyright ownership of the Little House on the Prairie series).

138. See Breyer, supra note 50, at 325 (“[A]s time passes persons wishing to reproduce old articles, books, designs, or other writings find it progressively harder to find the copyright owner to secure permission — particularly when copying is necessary because, for example, a book is out of print.”).
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and the more complicated it is to identify and contact the current holders. There may also be a good deal of uncertainty over who exactly owns the rights, due to the rather complex provisions of the Copyright Act involving renewals, termination of transfer, and inheritance. Finally, complexities about formalities, renewal and copyright term extension may call into doubt whether the work is even still copyrighted. All of these problems become more acute as the time from creation increases and records and memories grow thin, thus making access to the work more problematic as time passes. Indeed, these costs have been viewed by some as the primary policy reason for the limited term.

In addition, as time passes, the interest in having works that build upon the original increases. As mentioned above, one of the trade-offs in copyright law involves balancing incentives between initial works and follow-on works. The elements of this trade-off vary across time. In the initial years of a copyright's term, we are more concerned with compensating the original author for his or her creative labor, since these years have the greatest incentive effect. Over time, however, that incentive wanes, as discussed above. Conversely, as developed in more detail in the following section, the longer a work has been available to the public the more it becomes a likely candidate for others to build upon. It becomes part of the stock of works that future authors

141. See id.
142. See 1 GOLDSTEIN, supra note 5, §§ 3.0-3.19.
143. See id. § 4.9.
144. The Copyright Act does include certain record-keeping provisions designed to make it easier to determine whether a work is copyrighted and who owns it. See, e.g., 17 U.S.C. §§ 203(a)(4), 205, 302(d), 408, 705 (2000). And as more records are made available over the Internet, some of the above costs may be reduced. See Bell, supra note 114 (making broader point that the Internet will reduce licensing costs online); Landes & Posner, Indefinitely Renewable Copyright, supra note 61, at 6 (noting that such costs could be reduced prospectively). However, the difficulties associated with determining copyright status and ownership still remain formidable. See Bard & Kurlantzick, Millennium, supra note 4, at 22 n.27.
145. See Economists' Brief, supra note 56, at 13; BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 59 ("The costs that copyright imposes are likely to increase as the period of protection lengthens."); id. at 59 n.91 (describing the various costs); Cohen, supra note 121, at 1185; Gilbert & Shapiro, supra note 106, at 112 n.3 (noting same phenomenon in the patent context). Although this is a general rule, there may, of course, be exceptions. For example, there is little doubt about who owns the rights to Mickey Mouse. Thus, in some cases time may not accurately reflect this interest. I will address this in more detail below in Section IV.B, as part of my general response to the objection that time is merely a proxy for other factors that should be considered expressly.
146. See Cohen, supra note 121, at 1185; Landes & Posner, Economic Analysis, supra note 107; see also White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 19 (1907) (Holmes, J., concurring).
147. See Lemley, supra note 117.
have encountered and upon which they might want to build. Even if it is possible to license the right to create a derivative work from the copyright holder, any license fee (not to mention the tracing and negotiation costs already discussed) serves to increase the cost (and reduce the incentives) for such follow-on works. Accordingly, to the extent that we are interested in balancing incentives for both initial and secondary works, fair use should vary over time.

Thus, even if we cannot say with any certainty what the optimal length of the copyright term should be, we can say with confidence that time should at the very least be relevant under the incentive justification, and that the scope of copyright protection should properly be sensitive to the impact of time on incentives and access. The longer a work has been out, the weaker the incentive claim and the greater the access claim. Thus, one would expect the scope of copyright protection to decrease over time, under the incentive view.

B. Encouraging Re-Use and Critique

Sometimes one hears a variation of the incentive argument that goes like this: copyrights (and other intellectual property rights) are needed not only to provide incentives for the initial creation of creative works, but also for their orderly exploitation. That is, we give exclusive rights to copyright owners not only so that they have an incentive to write a book as an initial matter, but so they can also have control over sequels, movies based on the book, and other derivative works. Although this "prospect theory" has been most powerful in the

148. Indeed, for some particularly famous works, there may effectively be no reasonable substitutes. See Symposium, supra note 63, at 707-08 (statement of Wendy Gordon); Gordon, supra note 116; cf. Breyer, supra note 50, at 324 n.170 (suggesting that owners of copyrights in works that achieve "classic" status may be subject to less price competition since there will be fewer substitutes).

149. See Lemley, supra note 117, at 999 ("The limited duration of patents and copyrights promotes improvements in writings and inventions, by allowing subsequent authors and inventors to build upon what came before them.").

150. A number of commentators, in discussing term extension, have argued that to accurately balance the costs and benefits of term extension, we need to discount both the costs and the benefits. See Breyer, supra note 50, at 327 n.181; see also Hatch, supra note 7, at 736; Landes & Posner, Economic Analysis, supra note 107, at 362. That is, just as we discount the future revenue streams from additional protection, we should also discount the loss to consumers and others from extension. See Hatch, supra note 7, at 736-37; accord Economists' Brief, supra note 56, at 12-15. However, this observation does not undercut the proposal in this Article, since what is relevant is not an absolute comparison of costs and benefits as we progress further out in the copyright term. Instead, what is relevant is the relative significance of costs and benefits over time. That is, costs (such as tracing and other transactions costs) can be expected to increase as we progress further out in the copyright term, whereas revenues can generally be expected to stay constant or, more likely, decrease as the work fades in importance. (This latter assumption, while probably true in most cases, may not be true in all, and I discuss these cases in Section IV.B, infra). Thus, even if we discount both costs and benefits, the relative weight of these two factors can be expected to change over the copyright term, thus lending support to the proposal that time should make a difference.
field of patents, it has had some impact on copyright as well, particularly in the area of derivative works. The basic idea is that only one party should have control over Mickey Mouse. Imagine if anyone in the world could make their own Mickey Mouse movie. We would soon have different versions of Mickey (for example, evil Mickey, Mickey in space, an Asian Mickey), and the value created by the original author would be dissipated. Thus, copyright law needs to extend protection to works to provide for orderly development and careful preservation of value.

As an initial matter, there are some theoretical limitations to this justification for copyright law. Unlike patent law, copyright law is, in Paul Goldstein's terms, centrifugal rather than centripetal. Patent law deals with inventions and processes, and the overarching ideal is efficiency. That is, we want technology and innovation to converge on the most efficient solution or set of solutions. Under such conditions, orderly development of technology may make sense. By contrast, copyright seeks a diversity of expression. It is designed to permit variations, new expressions built upon existing ideas. We are not terribly disturbed by the idea that anyone can make a movie re-telling, in any form, the story of Romeo and Juliet or record a new interpretation of a Beethoven Symphony — indeed, this is generally seen as a good thing. While some ability to control derivative works may be desirable, too much control may not be. The prospect theory thus has more limited application in the copyright arena.

Even within the prospect justification, however, there is ample support for the idea that the scope of copyright should vary with time. It may well be that an author should be given some period of time during which to develop and control variations or derivative works


152. See Lessig, supra note 9, at 1069; Justin Hughes, "Recoding" Intellectual Property and Overlooked Audience Interests, 77 TEXAS L. REV. 923, 984-86 (1999) [hereinafter Hughes, Recoding].

153. See Landes & Posner, Indefinitely Renewable Copyright, supra note 61, at 12-13 (analogyizing this to over-grazing of common pasture).


155. See Paul Goldstein, Infringement of Copyright in Computer Programs, 47 U. PITI. L. REV. 1119, 1123 (1986) ("The aim of copyright is to direct investment toward abundant rather than efficient expression.").


based upon the original work. This could be justified on both a straight incentive rationale and a prospect rationale. Over time, however, that justification weakens, since the author has already had ample opportunity to engage in such development. Thus, it may be fair to give an author at least ten, perhaps twenty or even thirty years to write one or several sequels. But if she hasn’t written a sequel after fifty years, perhaps her interest in controlling the orderly development of the work is more attenuated and others should be permitted to build more aggressively on the work.158 Alternatively, if she has written twenty sequels in the intervening years, then perhaps she has adequately fulfilled that interest and the work should now be subject to interpretation from other perspectives. Either way, her interest, like the incentive interest, grows weaker as time passes.159

At the same time, society’s interest in seeing different perspectives and re-interpretations of the original work increases over time. Indeed, a number of commentators have argued that copyright must do more to actively support an interest in the reinterpretation of copyrighted works.160 In recent years, a number of scholars have critiqued the recent expansion of intellectual property law, focusing in particular on the extent to which the expansion hinders the ability of others to re-cast, transform, and derive new meanings from existing copyrighted works. These arguments have been particularly forceful in the areas of trademark law161 and the right of publicity.162 The basic claim is that people must have some degree of freedom to play with intellectual goods, to re-cast them, to imbue them with meanings independent of the ones that the original author intended, in order to make sense of them. These transformative activities are an essential part of what it

158. See LESSIG, supra note 121, at 258-59 (suggesting a “use it or lose it” system where, if a work is not made commercially available, others would be permitted to use it, perhaps under a compulsory license); JESSICA LITMAN, DIGITAL COPYRIGHT 12-14 (2001).

159. And certainly such an interest in giving an author time to fully realize his or her artistic vision is not applicable after the author is dead. Indeed, it is unclear how this interest would be served by giving such a right to the author’s heirs or transferees. See BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 120-21 n.159.


161. See, e.g., Dreyfuss, supra note 160.

162. See, e.g., Madow, supra note 160.
means to consume an intellectual good. Although these scholars recognize the need to provide incentives for the creation of such works, they are concerned that the scope of protection should not be so expansive as to limit essential critique and transformation.

These interests provide further support for consideration of time in fair use analysis. Again, one need not buy the argument in its entirety or even agree with any particular implementation; one need only recognize that time has an impact on the relative importance of this value. As discussed above, over time the original author's interest in controlling orderly exploitation of the work wanes. At the same time, as time passes the copyrighted work is more likely to be part of the common stock of works and ideas that others have encountered and wish to build upon. The longer a work has been published, the more desirable it becomes as material for discussion or re-casting. The longer a work has been out, the more likely it is that other authors will have encountered it and wish to build upon it or incorporate it into their own subsequent works.

Copyright law already recognizes this to some extent (in theory, if not in practice), through the limited copyright term. As their copyright terms expire, works pass from protected status into the public domain where they can be freely built upon, transformed, re-cast, and re-imagined by others. According to many commentators, the public

163. See Lange, supra note 160.

164. See also Netanel, supra note 107, at 369 (deriving limit from copyright's role in creating conditions for a democratic civil society).

165. See BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 60 (“Indeed, contrary to what is often asserted or assumed, the fact that a particular work enjoys lasting popularity is not a reason to extend the term of copyright but rather a reason to limit it. Its continued value heightens the interest in widespread dissemination and underlines the contribution to national culture and learning which follows from its entrance into the public domain where it can function as a building block of intellectual and imaginative activity.”); Gordon, supra note 116; Note, Originality, 115 HARV. L. REV. 1988, 1993 (2002) (“When certain texts have shaped our means of talking and thinking about important ideas, riffing on those texts in new literary works is a powerful way to refashion our language, worldview, and aesthetic. Such canonical texts are likely to be old, and thus to be in the public domain. But many famous texts are still under copyright.”).

166. See Note, supra note 10, at 1209 (proposing that courts deciding cases involving an author's re-telling of another's literary work expressly consider whether the original work “occupies a place of such culturally iconic status that not to permit a re-writing of it would suppress important and necessary discussion of that work.”).

167. The extension of the copyright term is but one of the ways in which passage of copyrighted works into the public domain has been hindered. Prior to 1976, copyright law required compliance with a number of formalities, such as notice, and if such formalities were not observed, a work would pass into the public domain. Thus, many works in fact passed into the public domain as a result of failure to comply with formalities. In 1976, however, Congress eliminated such formalities as a prerequisite for copyright protection. See 1 GOLDSTEIN, supra note 5, § 3.0. As a result, since that date, this avenue for passage into the public domain has been closed. See Landes & Posner, Indefinitely Renewable Copyright, supra note 61 (suggesting a renewal requirement as a means of casting additional works into the public domain).
domain's primary purpose is not to reduce the costs consumers pay for copyrighted works or to serve as a repository for works that are not worth protecting.\footnote{\ref{footnote168}} Instead, its purpose is to serve as a rich repository of material for subsequent authors to draw upon for their own works, without concerns about infringement or securing licenses.\footnote{\ref{footnote169}} Thus anyone can re-tell Shakespeare's classic story of two "star-cross'd lovers"\footnote{\ref{footnote170}} in any form, without first seeking a license to do so. Similarly, companies like Disney can mine the public domain for stories (as they have repeatedly done, for example, with the \textit{Hunchback of Notre Dame}, \textit{Pocahontas}, \textit{Hercules}, \textit{Cinderella}, \textit{The Little Mermaid}), to re-tell and re-imagine into their own copyrighted works.

A number of scholars have focused a good deal of recent attention on developing a richer concept of the public domain to serve as a counterweight to the recent expansionist tendency of intellectual property law.\footnote{\ref{footnote171}} These scholars have been concerned about the apparent lack of any structural mechanisms to counterbalance such expansions. Accordingly, they have begun to work towards concretely articulating the benefits that derive from a robust public domain and the harms associated with granting ever-stronger private rights over in-

According to these scholars, the eventual passage of works into the public domain is an essential feature of our existing copyright structure.

What has been less widely acknowledged has been the way in which works begin this passage from private to public even during the term of protection. That is, certain copyrighted works can take on more and more public character over time as they become more entrenched in popular consciousness and culture. Consider, for example, the iconic status of Mickey Mouse. In the early days, the cultural meaning attached to Mickey was probably not much more than the meaning attached to other cartoon characters of the time. Over time, however, Mickey has come to signify much more in our society and become a target for recasting and a focal point for alternate meanings. In many ways, the public's claim on Mickey has increased over time, even during its period of copyright protection. Many authors have thoughtfully analyzed the extent to which certain images, symbols, and characters may be necessary for us to engage in dialogue about popular culture and our surroundings. As time passes, works begin the passage from pure products of creative expression to objects that are part of our collective cultural history.

Or, to take a narrower doctrinal example, consider how such things as stock characters or scenes a faire, which are generally not protected by copyright law, come to attain that status. A work, character, or scene might start out as pure expression but, over the passage of time, start to resemble more closely a pure idea, a stock character, or a stock scene as the public is exposed to it and as others build and

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172. But see Landes & Posner, Indefinitely Renewable Copyright, supra note 61, at 11-16 (suggesting that there may be inefficiencies associated with public domain status).

173. See Netanel, supra note 107, at 368-69 (proposing a democratic approach to copyright scope that "would hold that works should at some point become a part of our common cultural heritage because they have considerable social value, not simply because of market failure").

174. See Madow, supra note 160.

175. See, e.g., Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979) (rejecting defense of fair use for defendants who published a bawdy adult comic book featuring Mickey Mouse).

176. An analog to this can be found in the trademark doctrine of genericism, where a trademarked term can lose its trademark status if the public adopts the word for use as a general term for the product (for example, escalator, thermos, aspirin). See Coombe, supra note 160; Dreyfuss, supra note 160.

177. See Gordon, supra note 116. See generally supra note 160; Litman, supra note 30, at 1013-17 (describing the way in which certain works "seep" into common usage). But see 2 Goldstein, supra note 5, § 10.2.1(b) (discussing satire).

178. Scenes a faire are elements of a creative work that are necessary to express an underlying unprotectible idea, scene, or plot. See 1 GOLDSTEIN, supra note 5, § 2.3.2.2.
elaborate upon it.\textsuperscript{179} The first person to write a scene involving a villain tying a heroine to the train tracks\textsuperscript{180} or a story involving a hard-boiled private detective might have created something that involved almost pure expression. However, as others repeat and embellish these ideas, they become stock scenes and characters, moving from expression towards idea,\textsuperscript{181} from the realm of private protection toward the public domain.

This view of the public claim on cultural works has been critiqued by a number of commentators. For example, Jane Ginsburg has sharply criticized the attempt by some commentators to shift the focus of copyright away from authors and towards the audience.\textsuperscript{182} In particular, she has objected to the threads of this literature that draw heavily from post-modern and critical cultural theories, arguing that they go too far in eliminating the author's privileged role in copyright law. Similarly, Justin Hughes has analyzed audience interests and concluded that audiences also have an interest in the stability of the meaning of cultural artifacts.\textsuperscript{183} That is, there may be audience members who would prefer more stable cultural artifacts, and making it too easy for others to transform or adapt these works may undercut the interests of these audience members. The argument that the public has some claim on a work is thus not uncontroversial.

One need not, however, go so far as to eliminate or greatly reduce consideration of authorial interests to recognize that these interests may be affected by the passage of time. Similarly, recognition that time may increase the public's claim on a work does not result in complete failure to consider the author's initial interests. Instead, one only needs to recognize that both of these interests exist, and that the balance between them is affected by the passage of time. In the initial years, authorial interests are at their greatest. But over time, these interests wane and the public claim on the work increases. We may differ over precisely when and where the balance shifts. But the proposal

\textsuperscript{179.} See Litman, \textit{supra} note 30, at 1016-17 ("Some aspects of works of authorship are easily absorbed, and once we have absorbed them, we are likely to make them our own and lose sight of their origins. Ideas, information, short phrases, simple plots, themes, stock scenes, and utilitarian solutions to concrete problems all share this characteristic.").

\textsuperscript{180.} Thanks to my colleague Alfred Yen for suggesting this example.

\textsuperscript{181.} This Article has focused on fair use as the doctrinal avenue for considering time as a factor in setting the scope of copyright protection. It is possible that time could have an impact on other copyright doctrines as well, such as the idea/expression dichotomy and the scenes a faire doctrine. For the purposes of this Article, however, I have focused on fair use because, as demonstrated in the following section, it provides the easiest and clearest doctrinal avenue for consideration of time-related interests.

\textsuperscript{182.} See Jane Ginsburg, \textit{Authors and Users in Copyright}, 45 J. COPYRIGHT SOC'Y U.S.A. 1 (1997).

\textsuperscript{183.} See Hughes, \textit{Recoding, supra} note 152; see also Kozinski, \textit{supra} note 160, at 469; Landes & Posner, \textit{Economic Analysis, supra} note 107, at 14 (analyzing this phenomenon in economic terms).
in this Article requires, at bottom, simply recognition of this balance.184

Given that this movement from purely private to public is a gradual one, it is a bit odd that copyright law does not expressly recognize this in setting the scope of protection, but rather purports to provide full protection up to the end of the copyright term, and then abruptly none at all. Consideration of time in fair use analysis would have the desirable result of permitting more extensive transformation, critique, and re-use of copyrighted works over time. Although this interest has admittedly not played as central a role in setting the copyright balance, we might expect this interest to be more relevant as the copyright term extends to keep many more works from falling into the public domain. In any event, consideration of time would have the beneficial effect of permitting the scope of such transformation, critique, and re-use to vary over time.

C. Rewarding Authors

The incentive argument discussed above is by far the most important and influential justification for copyright under U.S. law. Thus, the arguments above should be sufficient by themselves to give most courts reason to adopt time as a factor in fair use. In recent years, however, other noneconomic theories of copyright law have begun to make inroads. Although they do not approach the incentive argument in importance or influence, I will address them here at least briefly and show that they too support the proposal.

The strongest of these alternative theories has been the "author reward" argument. Based in part on the writings of John Locke, this justification holds that copyright law is a reward for the creative labor of authors.185 Unlike the incentive argument, the author reward argument is not based on the idea that authors should be rewarded in order to provide greater benefits for society more generally. Rather, the argument is that the authors have a moral claim to their creative works, based on natural law. This argument often finds expression not

184. Thus, the proposal here is not necessarily inconsistent with Justin Hughes's observation that some consumers may have an interest in the stable meaning of creative works. See Hughes, Recoding, supra note 152. Rather, the proposal provides a mechanism for balancing that interest, over time, with the countervailing interest in disrupting such stable meanings. See Hughes, Fair Use, supra note 10.

only in specific judicial opinions and particular features of copyright law, but also in common intuitions about fair treatment of authors and creators. That this justification has force can clearly be seen from the fact that copyright law fully protects works that would have been created even without any financial incentive, like research papers, personal letters, and diary entries. Copyright legislation is often influenced by these moral claims from authors.

The author reward justification has come under attack on a number of grounds. In particular, to the extent that this argument is based on the Lockean notion that all are entitled to the fruits of their own labor, some have questioned whether Locke's famous sufficiency proviso is satisfied, that is, whether there is "enough and as good" for others. After an author has asserted rights over a work, are there "enough and as good" other works or ideas out there for others to claim? Others have critiqued the author reward argument for the practical reason that it appears to have few limiting principles. Reward to authors tells us little about how much protection is enough, how much is too much, how much authors deserve. One could, for example, use the author reward argument to justify perpetual copyright ownership in the fruits of an author's labor.

A number of scholars have responded to this last critique by finding ways to limit the potential reach of natural law, thereby rendering it more useful as a practical justification for copyright law. One such

186. See, e.g., Yen, supra note 185.

187. See, e.g., Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intellectual Prop. of the Comm. on the Judiciary, 104th Cong. 233-36 (1995) (statement of Quincy Jones); id. at 240 (prepared statement of Bob Dylan, songwriter); id. at 241-42 (prepared statement of Don Henley).

188. See LOCKE, supra note 185, at 291.

189. Wendy Gordon has argued that in some cases, restrictions on the ability to build upon certain very prominent types of works might violate Locke's sufficiency proviso. See Gordon, supra note 116. That is, there may be a category of works that are so prominent, important, and/or unique that they are necessary in order to express oneself intelligibly about certain subjects and/or ideas. In such cases, giving an author the right to prevent uses of such essential properties may not in fact leave “enough and as good” for others because others might in fact be worse off than if the author had never created the work in the first place. See id; Symposium, supra note 63, at 682 (comments by Wendy Gordon) (discussing how this perspective would lead to a limited copyright term).

190. See BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 142.

191. See Reese, supra note 185, at 712 (arguing that "libertarian Lockeanism" does not clearly prescribe the scope of intellectual property rights).

192. Indeed, such arguments were advanced in support of perpetual copyright in England. Walterscheid, supra note 90, at 345-46; id. at 359 (recognizing that "if 'reward for genius' is considered the more important rationale, then there is a pronounced tendency to lengthen the term of patents and copyrights to better assure that the 'reward' will actually occur"); see also Adam D. Moore, A Lockean Theory of Intellectual Property, 21 HAMLINE L. REV. 65, 101-04 (1997).

193. See Gordon, supra note 116; Litman, supra note 30; Yen, supra note 185.
limit is based on the recognition that individuals are only entitled to fruits of their labor that are adequately measurable and practically definable. This is based on the observation that creative labor is rarely the product of a single author, working alone. Rather, authors take ideas, thoughts, concepts, and observations from other authors and society at large as the raw material of their work. The final work is not solely the product of one author's labor, but also of the labor of many others. As a result, the rights of the author should properly be limited, not absolute.

These limits lend support to the idea of a limited copyright term. Difficulties in tracing the provenance of works can be expected to increase over time, thus imposing a limit on the ability to clearly define the entitlement. To the extent that the author reward view is limited by the need to define entitlements with at least some degree of precision, this reward should wane as time and definitional problems increase. Moreover, this limitation recognizes that all authors generally benefit from being able to build upon the ideas of others, and that they all share an obligation of some kind to prior authors. Thus, the eventual passage of an author's work into the public domain can be seen as part of the bargain that the author strikes in creating a work that inevitably builds upon the creative labor of those who have preceded her. To the extent that an author herself has built upon the labor of others before her, she has a moral obligation to similarly permit those coming after her to build upon her labor. The idea is that authors have a moral obligation to help replenish the public domain.

194. See Yen, supra note 185.

195. See Gordon, supra note 116, at 1556; Litman, supra note 30, at 1007-08.

196. See BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 142 (“The appeal of the natural rights argument is also lessened by recognition of the contributions of others to the author's or artist's work.”); Symposium, supra note 63, at 677 (comments by Wendy Gordon); Edwin Hettinger, Justifying Intellectual Property, 18 PHIL. & PUB. AFF. 31, 36-40 (1989); Litman, supra note 30, at 1011; Reese, supra note 185; Yen, supra note 185. A variation of this idea, based on post-modern literary theory, suggests that authorship as a concept should have less relevance today, and that the audience also has a strong claim to providing meaning for the work. See, e.g., Lange, supra note 160; see also Jaszi, supra note 115, at 457-63. But see Ginsburg, supra note 182.

197. Even those who support a more author-centric conception of copyright law were troubled by the Sonny Bono Term Extension Act, insofar as the Act appeared to focus more on rewarding copyright holders rather than the authors and their families. See Ginsburg, supra note 35, at 171; Patry, supra note 4; Patry, Failure, supra note 60

198. See Symposium, supra note 63, at 677 (comments by Wendy Gordon); Yen, supra note 185.

199. See Symposium, supra note 63, at 683.

200. See Gordon, supra note 116, at 1557-58. Dawn Nunziato has developed this claim more formally in analyzing the issue of “intergenerational justice” among authors. See Dawn C. Nunziato, Justice Between Authors, 9 J. INTELL. PROP. L. 219 (2002). Nunziato applies a rights-based, Rawlsian analysis to the issue, and argues that authors, behind a Rawlsian veil of ignorance, would agree to limitations on the scope of their intellectual property rights,
Again, these observations tell us little about how long to set the term. They may suggest a limit imposed by time, but do little to indicate what that limit should be. Once again, however, a precise figure is not necessary to support the broader argument that time should matter. Once we accept the view that an author's moral claim to compensation should be limited and that a limit on the term of the copyright is an appropriate mechanism for such a limitation, it also follows that the longer a piece has been out, the weaker the author's moral claim to compensation is. As time passes, difficulties in defining the scope of the entitlement increase. Moreover, the longer the piece has been out, the greater the chance that it has contributed to the stock of ideas to which the original author owes a debt, and upon which other authors will want to build.

In addition, the continuing success of a work many years after its original creation may undercut the moral claim to reward in another way. If copyright is seen as a reward for creative labor, then we might ask to what extent the revenue generated by a work seventy years after the author's death is directly the result of such labor. Indeed, it may well be that the continued success of such a work owes less to the original labor of the author, and more to the contributions of society or the public more generally in imbuing that work with certain meanings.201 Again, take the case of Mickey Mouse. To what extent is the continuing success of that work due to the original creative labor of Mr. Walt Disney? Do we really believe that the relative success of Mickey Mouse over other cartoon characters of the time is solely or even primarily the result of better creative choices made by Mr. Disney at the time?202 A strong argument exists that, the further we move from the original creative act, the more likely it is that the continuing success of the work is due to factors unrelated to the original creative labor.203 Thus, we can expect the moral claim for reward to wane over time.

A closely-related, though analytically separate, line of argument focuses on the need to protect certain personality interests of authors. This justification asserts that products of creative thought are peculiarly personal to the author and represent an expression of the indi-
individual's self, which should be protected from certain types of harm. Based in part on the writings of Hegel, and elaborated most effectively by Margaret Radin, these arguments justify aspects of copyright protection based on the personhood interests of the authors.204 Although such arguments have generally been much more influential in Continental copyright law, they have recently found limited expression in the United States through the recognition of certain rights of integrity and attribution for certain works of fine art.205 These new enactments are designed not so much to protect the financial interests of authors, as their interests in their reputations as artists.

Even if one accepts this argument as a basis for some form of copyright protection, the impact of this argument wanes with the passage of time. Such author interests are by definition peculiarly personal to authors. Accordingly, it is difficult to see why such an interest should survive the author's own lifetime, much less seventy years after her death. Certainly, an author could feel personally or emotionally harmed by distortions or mutilation of her work. But after her death, it becomes difficult to see why such an interest should be respected.206 Indeed, U.S. copyright law recognizes very limited rights of integrity and attribution only for the life of the author, and only for works that are not generally meant for mass consumption.207 Furthermore, these interests can become even more attenuated when copyright interests have been transferred and are thus owned, not by the original author, but by corporations or other entities, as is often the case over time.208 Hence, even under this view, the interests of the author wane, while the corresponding interests of society increase, as time passes.209


206. See BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 69-70. Note that protection of personality interests, even to this extent, assumes individual authorship and ownership. Many works may be owned by corporations, either under the work for hire doctrine or through subsequent assignment of the copyright. See Bard & Kurlantzick, Millennium, supra note 4, at 49 & n.87 (statistics suggesting that a large percentage of commercially-valuable copyrighted works are owned by corporations); Hettinger, supra note 196, at 45 (arguing that this undercuts the personhood argument).

207. See 17 U.S.C. § 106A (2000). Note that other personal interests in the area of tort (for example, defamation) are similarly limited to the lifetime of the individual. See, e.g., RESTATEMENT (SECOND) OF TORTS § 560 (1976). But see CAL. CIV. CODE § 3344.1 (West 2003) (granting publicity rights to "deceased personalities.").

208. See Weinreb, supra note 125, at 1246 ("Even so, once the transfer has occurred, the personality-based aspect of the author's right is substantially gone."). But see 17 U.S.C. § 106A (rights retained by author even if copyright transferred).

D. Political Economy Arguments

A final set of arguments in support of the proposal can be found in pragmatic considerations relating to the manner in which copyright law is made in the United States. It is widely accepted that copyright legislation responds quite directly to the lobbying efforts of the copyright industries.210 It is not hard to see why. A narrow group of interests — namely the movie, music, publishing, and software industries — stands to benefit from expansion of intellectual property protection. They have the resources and incentives to lobby for such expansion in Congress.211 By contrast, consumers individually are largely indifferent to such expansions. Although they bear much of the cost of expansions, and such costs may be significant in the aggregate,212 each consumer bears only a miniscule share, spread out over time.213 Thus, as public choice theorists predict,214 consumers do not band together in sufficient numbers to oppose efforts by the copyright industries to expand protection.215 The few interested groups that do have some focus and resources — such as libraries and educational institutions — are simply outgunned by the array of countervailing interests. Moreover, to the extent that the interests of narrow, more focused groups are taken into account, they are usually granted a narrow exemption or privilege, leaving the broader expansion intact.216

210. See Jessica Litman, Copyright, Compromise, and Legislative History, 72 CORNELL L. REV. 857 (1987); see also Bell, supra note 48, at 786 (arguing that the Copyright Act has fallen into “statutory failure”); Denicola, supra note 158, at 35; Merges & Reynolds, supra note 76, at 53-54; Netanel, supra note 9, at 67-70; William F. Patry, Copyright and the Legislative Process: A Personal Perspective, 14 CARDOZO ARTS & ENT. L.J. 139, 141 (1996); Sterk, supra note 203, at 1244.

211. See Landes & Posner, Indefinitely Renewable Copyright, supra note 61, at 11 (analyzing such expenditures on lobbying as rent seeking).

212. See Karjala, Statement, supra note 51; BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, 71-76, 176-77 (estimating costs).

213. But see Hatch, supra note 7, at 728 (arguing that costs are outweighed by incentive and other benefits of extension); O'Rourke, supra note 106, at 174 (suggesting that the costs may not be that great, given other doctrines such as fair use that mitigate the impact of the extension).


The impact of this set of circumstances on the expansion of copyright protection has been extensively documented. In the substantial revision of the Act that occurred in 1976, the copyright industries were expressly invited to participate in the crafting of the Act, in part due to the complexity of the Act and the difficulty of balancing so many competing interests.\(^{217}\) Thus, industry lobbyists had a strong hand in setting the scope of protection. Moreover, the consistent expansion of the copyright term through the 1960s and 70s, and most recently in the Sonny Bono extension act, is a clear example of the political economy of copyright protection at work.\(^{218}\) Despite opposition by many intellectual property scholars\(^{219}\) and public interest groups, and despite extremely strong arguments against extension, Congress recently extended the term and applied it retroactively, largely in response to heavy lobbying pressure from the copyright industries. Given this, it is difficult to see how repeated extension of the copyright term can be effectively resisted. Existing copyright holders have powerful incentives to keep petitioning Congress for both prospective and retrospective extensions of the copyright term.\(^{220}\) The public at large will remain largely unresponsive.\(^{221}\)

Indeed, one of the more pernicious and underappreciated effects of the steady extension of the copyright term over the past thirty years has been to condition the public to generally accept a world in which cultural objects are owned. The copyright term is currently so long that the only works passing into the public domain have been those published before the 1920s, works that, while important, have comparatively less impact on the public today.\(^{222}\) We have thus grown accustomed to a world in which most of the cultural objects we encoun-


220. Nor are these incentives only recent. \textit{See, e.g.}, Walterscheid, *supra* note 90, at 327 (detailing the practice of seeking extensions to existing patent monopolies in 18th century England).

221. \textit{But see} Merges, *supra* note 76, at 2237 (highlighting some cases where opposition might arise because of a countervailing interest group, as in the case of proposed database protection bills).

222. Notable exceptions include such public domain works as the character of Santa Claus, the works of Shakespeare, and classical music, myths, and stories.
ter on a daily basis are owned. As a result, we do not by and large register losses to the public domain, since we have never truly realized its full benefits. Indeed, the idea of Disney not owning Mickey Mouse seems distinctly odd. Contrast this with the state of affairs that existed when the initial copyright term was only fourteen years. Then, the value of the public domain was much more concrete and immediate, since valuable works would soon be in the public domain, either through expiration of the term or through failure to comply with statutory formalities such as notice (which have largely been eliminated). Or, to take another example, consider the far shorter term in patent law, where the benefit from expiring patents is not only concrete, but an essential part of the patent bargain. Through the gradual extension of the copyright term, the public has been made even less sensitive to the value of the public domain, and accordingly, will have even less of an incentive to resist term extension efforts.

Because of the structural obstacles that limit Congress' ability to equitably address the issue of term expansion, judicial action becomes more attractive as a mechanism for ensuring that public-regarding limits on copyright scope are imposed. In recognition of this, many commentators have turned to the limits in the Constitution imposed by the Copyright Clause and the First Amendment. However, such challenges have significant limitations, as already discussed. The pro-

223. See COOMBE, supra note 160 (describing the intellectual property she encounters during her daily commute).

224. See Travis, supra note 36, at 831 ("The public's reversionary interest in most twentieth-century works is functionally non-existent.").

225. See Kozinski, supra note 160, at 467; Lessig, supra note 9, at 1069 ("The ordinary person believes, as Disney's Michael Eisner does, that Mickey Mouse should be Disney's for time immemorial. The ordinary person doesn't even notice the irony of perpetual protection for Disney for Mickey, while Disney turns out The Hunchback of Notre Dame (to the horror of the Victor Hugo estate), or Pocahontas, or any number of stories that it can use to make new work.").

226. In his Commentaries shortly after passage of the initial Copyright Act, Justice Story wrote that short terms are beneficial because they "admit the people at large, after a short interval, to the full possession and enjoyment of all writings and inventions without restraint." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1147 (Fred. B. Roghman & Co. 1991) (1833). By contrast, discussions about the value of works passing into the public domain has, until recently, been much more muted.

227. See 1 GOLDSTEIN, supra note 5, § 3.0.

228. Note there have been recent efforts to change this. See, e.g., Boyle, Enclosure, supra note 171; Boyle, Environmentalism, supra note 215; Conference on the Public Domain, Duke Law School (Nov. 9-11, 2001), at http://www.law.duke.edu/pd/ (last visited Sept. 20, 2002).

229. See Merges, supra note 217, at 1875 ("In this view, courts are a necessary counter-weight to inevitable rent-seeking on the part of special interests who lobby Congress."); cf. Macey, supra note 214.

230. See sources cited supra note 90; see also Lemley, supra note 90, at 531 (describing trend); Merges & Reynolds, supra note 76.
posal in this Article provides a practical and effective alternative way for courts to ameliorate some of the undesirable effects of copyright expansion and inject some public-regarding values into copyright scope over time.231 Considering time in fair use may be one of the few remaining ways for such values to find expression.232 Courts may thus be able to adjust the scope of protection to compensate for the increase in the term of protection.233

It may well be, of course, that courts are no more inclined than Congress to inject public-regarding values into the scope of copyright protection. Indeed, recent expansion of copyright and general intellectual property protection has not been the exclusive province of Congress. Rather, many courts have expanded the scope of intellectual property protection on a number of fronts, through interpretations of intellectual property statutes and other legal doctrines.234 Although these expansions cannot be explained by imbalances in lobbying power, a number of commentators have suggested various alternative reasons for this expansion. One possible explanation is the rhetorical appeal of arguments based on the need to protect “property rights,” without adequate consideration of the potential costs of such protection in the intellectual property context.235 Another possibility is that, as in the market for legislation, the copyright industries are repeat players in copyright litigation,236 and therefore are able to better shape the law through selective lawsuits and selective settlements.237

231. It could be argued that courts should not be engaged in this kind of activity. I address this argument expressly below. See infra Section III.B.

232. See O'Rourke, supra note 106, at 173 (suggesting that “the Bono Act provides an even clearer example of how courts can mitigate congressional errors by applying scope-defining doctrines”).

233. See Landes & Posner, Indefinitely Renewable Copyright, supra note 61 (proposing an alternative solution to this problem).


236. See Glynn S. Lunney Jr., The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act, 87 VA. L. REV. 813, 901 (2001); see also Wendy J. Gordon, On Owning Information: Intellectual Property and the Restitutionary Impulse, 78 VA. L. REV. 149, 279 (1992) (noting that the interests of the broader community are not always represented in the adversarial posture of litigation); Lange, supra note 30, at 176 (suggesting that courts appoint a guardian ad litem for the public domain, in cases involving new intellectual property interests).

Be that as it may, there are reasons to believe that the proposal offered in this Article offers a better avenue for public-regarding values to be expressed in the scope of protection. As developed in more detail below, the proposal does not require courts to do any more than apply standard fair use analysis. It does not require any major change in existing law. Moreover, the equitable balancing test provided by fair use will provide courts with an easy way of injecting such values in an incremental, case-by-case manner, rather than by adopting a binding interpretation of a statutory provision or striking down a statute entirely. Although the effect of such a change might be less dramatic, it may well be easier to achieve and will have significant beneficial effects over the long run. Finally, the courts certainly provide an alternative avenue for lawmaking that is comparatively more shielded from the lobbying pressure of the copyright industries, and thus more able to respond receptively to appeals to the public interest.238

III. DOCTRINAL ARGUMENTS

The arguments above establish that there are extremely strong reasons to consider the passage of time in determining the proper scope of copyright protection. All of the existing justifications for copyright law support the view that copyright protection should vary over time. Indeed, after consideration of the above arguments, it seems particularly odd that courts do not consider time. Given the extreme length of the current copyright term and the extent to which markets and incentives change over such a long time period, a copyright scope that is static and fails to consider the passage of time seems highly artificial.

What follows, then, is an examination of the doctrinal case for considering time. That is, given that strong policy reasons exist to consider time in copyright law, is there doctrinal support for such a consideration? The answer is a surprisingly strong yes. Indeed, the fair use defense seems tailor-made for such a consideration, and in this section I develop the doctrinal argument, based on the text and legislative history of the Copyright Act as well as case law. I then address a particular doctrinal argument resulting from the recent term extension.

A. Text, Legislative History, Case Law

In building the doctrinal case for this proposal, it is important to note at the outset that the fair use defense was created by the courts, not by Congress.239 The 1909 Act (and all of the preceding copyright acts) nowhere mentioned a defense of fair use. Rather, the early acts


239. 2 GOLDSTEIN, supra note 5, § 10.1, at 10:2.
defined the rights of copyright owners and presumed that infringement followed upon violation of these enumerated rights. Courts, in applying the 1909 Act, created the fair use defense out of whole cloth, viewing it as necessary to support the overall purpose of the Act: the creation and broad dissemination of creative works.\(^{240}\) Thus, the courts fashioned and developed the fair use defense over time, permitting use of a work for various educational, critical, and other purposes, even though such uses infringed the literal terms of the statute. In 1976, Congress finally approved this line of judicial activism and codified the defense in § 107 of the current Copyright Act.\(^{241}\)

Congress's codification of fair use, however, reflected the judicial origins of the defense and left the courts with broad discretion to continue to apply it in a flexible manner. The House Report to the 1976 Act stated:

> The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.\(^{242}\)

Thus, Congress expressly contemplated that fair use would remain a flexible doctrine that judges could freely adapt to meet changing circumstances.\(^{243}\)

The text of the fair use defense reflects this orientation toward flexibility and adaptability, setting forth a number of nonexclusive factors that a court should consider in making the case-by-case determination of fair use:

> § 107. Limitations on exclusive rights: fair use.
> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching ... scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

\(^{240}\) The earliest articulation of the fair use defense in U.S. law is generally considered to be *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (Story, J).

\(^{241}\) 2 GOLDSTEIN, *supra* note 5, § 10.1, at 10:2.


\(^{243}\) See *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (fair use doctrine " 'permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster' ") (citations omitted); 2 GOLDSTEIN, *supra* note 5, § 10.1.4, at 10:11.
(1) the purpose and character of the use, including whether such use is of a commercial nature . . .
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work . . .

Note that the text, as suggested by the legislative history, sets forth various factors and purposes, but does not purport to make them exclusive. Instead, courts are expected to continue to apply fair use in a flexible manner.244

A court could, consistent with the text of the Act, properly consider time in at least two places. First, a court could consider the passage of time under the second fair use factor, the nature of the copyrighted work.245 Courts have, in considering this factor, generally focused on whether the work was creative as opposed to factual, and whether it was published or not.246 As a general matter, creative or unpublished works are accorded greater protection than factual or published works.247 Nothing in the text of the statute, however, prevents a court from also considering the age of the work, since this is certainly a part of its “nature.” Indeed, courts — including the Supreme Court — have considered other aspects of a copyrighted work besides the two most common factors in analyzing the nature of the work.248 A court could thus, in assessing the “nature” of a copyrighted work, consider the age of the work and thus incorporate this consideration into the fair use analysis.

Second, a court could consider time independently as a separate and distinct factor. It is clear from both the text of the statute and the legislative history that the factors in § 107 are not exclusive. The text

244. This delegation of authority from Congress gives courts a significant role in determining the practical scope of copyright protection. See 2 GOLDSTEIN, supra note 5.
245. See, e.g., Note, supra note 10, at 1212 (proposing that courts deciding cases involving the re-writing of another author’s copyrighted work consider time in the second fair use factor).
247. See 2 GOLDSTEIN, supra note 5, § 10.2.2.2, at 10:48-10:49. But see William Landes, Copyright Protection of Letters, Diaries, and Other Unpublished Works: An Economic Approach, 21 J. LEGAL STUD. 79 (1992) (arguing that unpublished works should have same level of protection as published works, in some circumstances).
248. See, e.g., Sony Corp. v. Universal City Studios, Inc. 464 U.S. 417, 449-50 (1984) (offered to the public for free); Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc. 964 F.2d 965, 971 (9th Cir. 1992) (underlying work already sold). Indeed, the Supreme Court in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), implicitly recognized that the public nature of a work might be relevant in certain fair use cases. See id. at 586 (noting that this factor “is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works”).
expressly states that the factors to be considered "shall include," and nowhere suggests that these factors are an exclusive list. Indeed, the legislative history behind the Act clearly establishes that Congress meant to give courts broad discretion to consider additional factors not on the list.249 A later House Report, explaining the language in the statute stated:

The Committee was concerned that as introduced, [the original language] might have been inadvertently construed to discourage courts from looking at additional factors. The phrase "all the above factors" is intended to encompass the terms "including" and "such as" embodied in the preamble to Section 107, terms that are defined in Section 101 of title 17 as being "illustrative and not limitative." Thus . . . the courts must consider all four statutory factors, but they may, at their discretion, consider any other factors they deem relevant.250

Courts have, over the years, taken Congress up on this grant of discretion, considering various factors not included in the list.251 These additional factors have included: the bad faith of the defendant (resulting in a narrower scope of fair use),252 acceptance of public funds by the author in creating the work (resulting in a broader scope of fair use),253 and industry custom.254 Thus, courts could, consistent with the text, legislative history, and case law, consider time as an additional, independent factor in fair use analysis.255

249. See 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A], at 13-153 (2001) ("[T]he factors contained in Section 107 are merely by way of example, and are not an exhaustive enumeration. This means that factors other than those enumerated may not have a bearing upon the determination of fair use."); see also Harper & Row, 471 U.S. at 570; Castle Rock Enter., Inc. v. Carol Pub. Group, Inc., 150 F.3d 132, 141 (2d Cir. 1998); Sega Enterp. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1522 (9th Cir. 1992); Maxtone-Graham v. Burchell, 803 F.2d 1253, 1260 (2d Cir. 1986).


254. See, e.g., Triangle Pubs., Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1176 (5th Cir. 1980).

255. Justin Hughes's proposal, by contrast, would fold consideration of time into the fourth fair use factor — the impact of the use on the potential market — by having courts look at how much longer the work will remain protected. See Hughes, Fair Use, supra note 10.
In the end, then, the doctrinal argument in support of the proposal is remarkably simple and clear-cut. The text, legislative history, and case law on fair use clearly authorize courts to consider time, whether as part of the second factor or as an independent factor. The only real question is whether a court, in exercising its delegated discretion to consider time in fair use analysis, feels that such a consideration is warranted or desirable. As demonstrated in the previous part of this Article, very strong policy considerations support considering time as a factor in fair use analysis. This should provide courts with ample incentive to factor this into the consideration of fair use.

Indeed, considering time as a factor in fair use would not require courts to depart dramatically from existing practice — courts already implicitly consider time in some fair use cases because a number of the existing fair use factors are influenced by the passage of time. For example, the unpublished status of a copyrighted work, which is relevant in assessing the second factor (the nature of the work), will often be correlated with the age of the work. The Supreme Court case Harper & Row v. Nation, for example, involved a magazine's publication of as-yet-unpublished excerpts from former president Gerald Ford's biography. In that case, the Court clearly recognized that the age of the work had an impact on the various policy justifications factoring into the fair use analysis. Other cases involving unpublished works address similar considerations.

Similarly, the fourth factor, the potential impact on the market, is often influenced by the passage of time. The younger the work, the greater potential there is for a market to be affected by a particular use. Conversely, the older the work, the less likely a market might be affected, particularly if the work is no longer being fully exploited or a license is difficult to secure. For example, copying an excerpt of an old, out-of-print book is unlikely to result in any appreciable harm to the market for that book. Thus, in many cases, the age of a work

256. See O'Rourke, supra note 106, at 174 (“Moreover, at least some of these doctrines, particularly fair use, tend to be time-sensitive, allowing more use of information if relevant market indicators demonstrate that competition would be enhanced by permitting certain uses to proceed.”).

257. In some cases, a work might be unpublished for quite some time after creation. For example, a historical figure's private letters might be published many years after that figure’s death. Thus, unpublished status is not perfectly correlated with time.


259. Id. at 554-55.

260. See generally 2 GOLDSTEIN, supra note 5, § 10.2.2.2(b).


262. Consideration of time is thus also consistent with the market-failure justification for fair use, see Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic
may be reflected in analysis of the market harm factor. True, this will not always be the case. For example, if a work is still being actively exploited late in its term (as is the case with, for example; Mickey Mouse), then time may not correlate with harm to the market. For every such case, however, there are many other cases where the correlation will exist.

The broader point is that express consideration of time would not be a dramatic departure from existing practice because courts already implicitly consider time in fair use analysis in some cases. It could be argued that, if courts already consider time in fair use analysis, there is no need for courts to consider time expressly. I address this argument in more detail in the last section of this Article, which deals with anticipated objections to the proposal. For present purposes, let me simply note that the values supporting consideration of time are not always captured in the existing fair use analysis. Moreover, there are substantial additional advantages to considering time more expressly. The main point I wish to make here is simply that courts are already implicitly considering time in some fair use analysis, and that the proposal in this Article would thus not be an unduly dramatic change.

Finally, not only is consideration of time fully authorized by the statute, legislative history, and case law; it is also consistent with the underlying policy justifications supporting fair use. Conventionally, two main theories have been advanced to explain the role fair use plays in copyright law: the public benefit theory and the market failure theory. Under the public benefit theory, fair use is justified by the broader societal goal of promoting substantive values such as critique, research, education, and dissemination of knowledge. Under this theory, older works should generally be subject to greater fair use, since such works are more likely to form a part of our common cultural heritage and be desirable subjects of research, critique, and study. Thus, broad fair use for older works supports these substantive goals underlying fair use.

The proposal here is also consistent with the market-failure justification for fair use. Under this justification, fair use should be permit-

Analysis of the Betamax Case and Its Predecessors, 82 COLUM. L. REV. 1600, 1620 (1982), since, as already discussed above, transactions costs can be expected to increase as time passes.

263. See infra Section IV.B.

264. See 2 GOLDSTEIN, supra note 5, § 10.1.2.

265. See BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 59 ("Facilitation of the copying of old works, such as literary writings or recordings, is particularly important, though, for an old work which someone wishes to duplicate is likely to be of unique merit or to be needed for research or education, socially valuable activities.").

266. Accord Hughes, Fair Use, supra note 10.

267. See 2 GOLDSTEIN, supra note 5, § 10.1.1 (calling this the "private benefit" approach); Gordon, supra note 262.
ted for certain small-scale uses of works when the costs of obtaining a license for such use exceeds the value of that use (e.g. photocopying a single article or quoting a single phrase).268 Under this theory, fair use is a response to market failure. As already pointed out above, we can expect transactions costs to rise (and the market, therefore, to fail more frequently) as a work gets older.269 Conversely, where a work is comparatively younger, it will be relatively easy to identify the copyright owner and negotiate a license. Thus, consideration of time is broadly consistent (though again, not perfectly so) with this alternate justification for fair use.

At the end of the day, the doctrinal argument in support of the proposal is remarkably strong. The copyright statute, legislative history, case law, and primary theories supporting the fair use doctrine all provide strong support for courts to consider time as a factor in fair use analysis. This strong doctrinal support, combined with the extremely strong policy arguments, should provide courts with all the reasons they need to consider time as a factor in fair use analysis.

B. Dealing With Sonny Bono

One doctrinal counter-argument to the proposal could be based on Congress's enactment of the Sonny Bono Copyright Term Extension Act (the "Bono Act").270 The argument would look something like this. Congress recently extended the term of copyright protection by an additional twenty years. In so doing, Congress expressly found that the incentive from an additional twenty years was justified for various reasons, including the increased useful life of works in the digital age and the need to harmonize U.S. and European copyright law. By taking time into account in fair use analysis and effectively reducing the scope of protection over time, courts would be frustrating this legislative intent. Thus, courts cannot, consistent with the recent term extension, consider time as a factor in fair use analysis.

This argument is weak on a number of fronts. First, the argument finds no support as a matter of statutory interpretation. The plain text of the term extension says nothing at all about fair use and what courts should consider in fair use analysis.271 Its limited and focused purpose is to extend the term by an additional twenty years, and consideration of time in fair use analysis is in no way inconsistent with the plain terms of the extension. Thus, the plain meaning of the extension does

268. See Gordon, supra note 262.
269. See supra Section II.A. But see Bell, supra note 114, at 586 (suggesting that the Internet may reduce transaction costs on-line and thus lead to a narrower scope of fair use).
271. See id.
not foreclose consideration of time. Second, no specific intent of Congress would be frustrated by consideration of time in fair use. That is, Congress did not, in passing the extension, specifically intend that courts should refuse to consider time or freeze the scope of fair use. This is not surprising, since courts have thus far not explicitly considered time in their fair use analysis. Thus, Congress could not have anticipated or had any specific intention about such practice.

Third, the more general intent of Congress to extend the term would not be frustrated by interpreting fair use to incorporate consideration of time. In enacting the extension, Congress did not intend to shrink or freeze the scope of fair use or limit the considerations available to courts under section 107. Rather, Congress intended merely to extend protection — whatever the substantive scope of that protection — another twenty years.272 Considering time as a factor in fair use analysis thus does not conflict with the extension of the term, because it only affects the scope, not the duration of the copyright. Authors will still be entitled to an additional twenty years of copyright protection. However, that additional twenty years will, like any other twenty year period of the copyright term, be subject to whatever limitations courts allow under the fair use defense.

True, it would clearly be inconsistent with the intent and policy of the Act if a court expressly deprived an author of all protection for the additional twenty-year period. And if this proposal aimed to accomplish the same goal, albeit not explicitly, then a strong argument could be made that the intent of Congress was being frustrated. However, the proposal here does not deprive authors of all protection for the extension period. Indeed, authors will still have a great degree of protection.273 They will still have full rights during that period to prevent copying, public distribution, public display, public performance, and the creation of derivative works. Like rights during the term more generally such rights will simply, be subject to limitation by fair use. Nor, as developed in more detail below, is the proposal even targeted expressly at the extension term. Rather, the proposal is a change in the scope of fair use that would apply over the entire length of the copyright term and might even result in increased protection earlier in a copyright’s term. The proposal is truly aimed more at scope rather than duration, and it is not in any way inconsistent with Congress’s intent in enacting the Bono Act.274

273. The Sonny Bono Act does include an exception to infringement for libraries during the extension period, “for purposes of preservation, scholarship, or research,” under certain circumstances. 17 U.S.C. § 108(2)(h)(1).
274. See Garon, supra note 36, at 600 (suggesting that Congress either repeal the extension or modify the extension so that protection is more limited during the extension period).
Finally, even if there were some modest amount of tension with congressional intent, good reasons exist for interpreting the Bono Act narrowly and not extending its preemptive effect beyond the literal words of the enactment itself. A number of commentators analyzing theories of statutory interpretation have suggested that courts should subject statutes to narrower construction when the statutes result from systemic or structural imbalances in lobbying power.275 Under this view, courts engaging in interpretation have a role in policing the legislative process, to check such imbalances and to ensure that public-regarding values are represented. As described above, the Bono Act bears all of the hallmarks of a statute enacted largely in response to unequal lobbying power.276 Accordingly, under this interpretive view, the scope of the extension should not be read more broadly than necessary.277

This view is, naturally, not uncontroversial. Others have argued that legislation represents little more than the bargain struck by competing interest groups lobbying for legislation, and the role of the courts is to enforce this bargain.278 Thus, courts should try to effectuate the intent of the parties to the agreement and refrain from any interpretation of statutes that would frustrate this intent. Under this view, the injection of public-regarding values from outside the legislative bargain struck by competing lobbying groups would be an illegitimate exercise of judicial power. Applied to the proposal in this Article, the argument would be that the Bono Act should be interpreted to bar the proposal, since the parties who lobbied for the extension clearly ex-

275. See, e.g., Daniel Farber & Philip Frickey, Law and Public Choice: A Critical Introduction 131 (1991); see also William Eskridge Jr. et al., Legislation and Statutory Interpretation 81-90 (2000); William Eskridge, Jr., Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 Va. L. Rev. 275, 303-05 (1988); Macey, supra note 214, at 224; Netanel, supra note 9, at 66 n.278; Cass Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 471 (1989). The same argument has been made in support of calls for the courts to strike down such laws as unconstitutional. See Merges, supra note 76, at 2238-39 ("I am only arguing that, when an imbalance is clear, courts ought to treat it as relevant. In a close case, where a statute seems close to a line drawn by the Constitution, it should be relevant that only industry groups were represented during the drafting of the statute. Not determinative; but relevant. A copyright term incapable of serving as an incentive at any plausible discount rate . . . in these and similar cases, an inquiry into the legislative process seems a relevant consideration. In a close case, that inquiry should tip the balance."); Merges & Reynolds, supra note 76, at 59.

276. See Bard & Kurlantzick, Copyright Duration, supra note 4, at 215-20; supra Section II.D.

277. See Merges, supra note 76, at 2238; O'Rourke, supra note 106, at 169 (arguing that courts interpreting intellectual property statutes can play a role in compensating for imperfections in the legislative process).

pected and intended for the additional twenty years of protection to be full and unaffected by the passage of time.

A lengthy discussion of this debate is beyond the scope of this Article. Suffice it to say that I find generally more persuasive the interpretive stance adopted by the commentators arguing for stricter scrutiny of statutes resulting from systematic imbalances in lobbying power. Although one must certainly be careful to distinguish cases where such imbalances are systematic from cases where imbalances are simply part of the regular political process, the evidence suggests that the recent extension of copyright protection is not a case that is close to the line.279 In any event, even under the interest-group bargain theory there is little evidence that Congress had any specific or general intent regarding the scope of copyright protection, and certainly such an interpretation is not found anywhere in the text of the bargain. Finally, no real tension exists between Congressional intent (of whatever kind) and this proposal, since the proposal in this Article deals with the scope of copyright protection, not its duration.

IV. THE PROPOSAL IN DETAIL

Having constructed both the theoretical and doctrinal arguments in support of the proposal, I now turn to the specifics of the proposal. The proposal itself is easy to state: courts should consider time as a factor in fair use analysis. What remains is an elaboration of what the proposal means and what sorts of concrete results would follow from its adoption. In particular, how might copyright law be different if we adopted this proposal? As the analysis below will show, consideration of time would improve fair use analysis by permitting courts to tailor the defense more closely to the justifications underlying copyright law generally.

A. Some Examples

As described above, the most straightforward manner of incorporating time as a factor in fair use analysis would be to consider time expressly as one of the many independent factors in fair use analysis. Since each of the factors contributes to the totality of the circumstances used to evaluate whether a use is "fair," time would not be dispositive in and of itself.280 Rather, a court would still consider all of the factors in fair use analysis, and consideration of time would simply be folded into the broader analysis. At the same time, the impact of

279. See supra Section II.D.

280. See, e.g., Note, supra note 10, at 1213 (making similar point with respect to proposal that courts consider time in deciding cases involving the re-writing of another author's copyrighted work).
time on fair use would not be trivial. Indeed, consideration of time would greatly increase the scope of fair use at the end of the copyright term and perhaps decrease the scope of such use at the beginning of the term.

1. Transformative Uses

Some examples will help clarify how time might affect the scope of fair use. Take the recent, much-cited dispute involving publication of the book *The Wind Done Gone.* In *The Wind Done Gone,* the author, Alice Randall, created a fictional work based on Margaret Mitchell's *Gone With the Wind.* Randall re-told aspects of the story from the perspective of a woman named Cyanara, the daughter of a slave living on the plantation. Randall intended for the book to serve as a critique of *Gone With the Wind*’s depiction of slavery in the Civil War era. In so doing, she appropriated many characters (such as Scarlett O’Hara, Rhett Butler, Ashley Wilkes, and Mammy), the general plot, some dialogue, and major scenes from *Gone With the Wind.*

Upon learning of the book, the trustees of the Margaret Mitchell trust sued Randall for copyright infringement. The federal district court ruled in favor of the trust, enjoining publication of the work. In reaching this result, the court rejected Randall’s fair use argument, primarily based upon the commercial nature of the new work and the impact on the potential market for sequels or other versions of *Gone With the Wind.* This decision, however, was reversed on appeal, the appellate court holding that Randall’s fair use defense was likely to succeed and so publication of her work should not be enjoined. In

281. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001). This specific example has been developed in Note, supra note 10, at 1193. It also has been a popular example in much recent copyright literature. See, e.g., Lessig, supra note 121, at 198-99; Netanel, supra note 9; Note, supra note 10; Note, supra note 165.


284. These characters were in many cases re-named, although clearly with reference to the original (e.g. Rhett Butler was renamed R.B., etc.). *Suntrust Bank,* 268 F.3d at 1267.


287. Id. at 1379, 1382.

288. Suntrust Bank, 268 F.3d 1257 (11th Cir. 2001).

289. The appellate court initially vacated the injunction on the grounds that it represented an unconstitutional prior restraint. Suntrust Bank, 252 F.3d. at 1166. It subsequently supplemented its initial order with a more comprehensive opinion on the substantive copyright issue. Suntrust Bank, 268 F.3d at 1259.
applying the traditional four factors of the fair use test, the court held that the use was clearly transformative because it sought to parody and critique the original, and that there was insufficient evidence to support a finding that the market for *Gone With the Wind* or any derivative works would be harmed by Randall's use.290

Consideration of time as a factor in this case would have made the ultimate outcome easier to reach.291 A court considering time would have noted that the original *Gone With the Wind* was published in 1936, and was nearing the end of its copyright term.292 This means that Margaret Mitchell and her estate had already had more than sixty years of exclusive right to sell the original work, to authorize new versions, and to exploit it through derivative works such as movies293 and sequels.294 By any measure, both Mitchell and the estate had been amply compensated for the work.295 At the same time, *Gone With the Wind* has, over time, achieved a prominence in our culture that makes it a desirable target for re-invention and re-telling. Indeed, the book is one of the best-selling works of all time, second only to the Bible.296 Accordingly, the scope of permissible transformative re-telling should be much greater now, more than sixty years after original publication.

Of course, consideration of time would need to be weighed along with the other fair use factors. Thus, in this case, time would merely be another factor weighing in favor of fair use, along with the transformative nature of the use. Combined with the other factors, consideration of time would have reinforced the ultimate outcome. On the other hand, one could imagine a different set of facts under which time would not be sufficient to lead to a finding of fair use. For example, say the case had involved the defendant selling exact, unauthorized copies of the original novel. The age of this work would still support a finding of fair use, but would be outweighed by the other four factors that would all point against fair use. Thus, time would not by itself be dispositive, though it would affect the analysis.

290. *Suntrust Bank*, 268 F.3d at 1267-76.


292. The court in *Suntrust Bank* briefly noted that *Gone With the Wind* was approaching the end of its copyright term, but only in mentioning that future derivative works would only be protected as to their original contributions, and that elements drawn from the underlying work would pass into the public domain. *Suntrust Bank*, 268 F.3d at 1275.

293. See *GONE WITH THE WIND* (Metro-Goldwyn Mayer 1939).


295. See Note, *supra* note 10, at 1211-12 (noting that the novel "has sold tens of millions of copies, and was made into a film that, in inflation-adjusted dollars, is the highest-grossing movie of all time.").

296. See *Suntrust Bank*, 268 F.3d at 1259.
Consideration of time as a factor might also mean more protection in the initial years of a work's life. That is, including time in the fair use calculus does not necessarily result in less overall protection for copyrighted works. Indeed, it might mean even more protection in the initial years of a work, when the value of such protection is greatest. For example, imagine the same set of facts in the *Wind Done Gone* case, but applied to the most recent Harry Potter novel. Say an author decides to publish his own version of a Harry Potter novel, but from the perspective of one of the minor characters in the book. And suppose that this perspective is a critical one, highlighting certain undesirable assumptions underlying the book.

Even though the facts might be nearly identical to those in the *Wind Done Gone* case, considering time as a factor could lead a court to find no fair use. Here, the work would have only been published for a couple of years. Accordingly, the potential impact on creative incentives is much greater. The original author would not have had significant time to exploit the work commercially or to fully realize the artistic vision underlying it. Moreover, the interest in controlling derivative works is much stronger, since licensing derivatives takes both time and effort, and only a short period of time has passed. And even though the Harry Potter books have garnered much attention, they have not yet attained iconic stature nor embedded themselves as firmly into our cultural consciousness as *Gone With the Wind*. Thus consideration of time could well lead to a different conclusion in a case involving a younger work. At the same time, the exact same facts occurring eighty years from now would likely lead to a different result.

Or take another example: Mickey Mouse. In the late 1970s, Disney sued the publishers of a counter-culture comic book, titled *Air Pirates*, which depicted Mickey and Minnie Mouse engaging in drug-smuggling and various unseemly activities. Although the court in that case held that the comic book constituted a parody sufficient to trigger a possible fair use defense, the court ultimately concluded that the use was not fair, based upon a weighing of the four factors. If the court had

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297. See Note, supra note 10, at 1213 (mentioning precisely this example and arguing that this would be a closer case). The Harry Potter books themselves were the subject of a copyright dispute. See Scholastic, Inc. v. Stouffer, 56 U.S.P.Q.2d 1035 (S.D.N.Y. 2000).

298. See Lange & Anderson, supra note 171 (suggesting, for younger works, some kind of "sharing" arrangement); Note, supra note 10, at 1212.

299. A number of much-anticipated sequels are on their way. Cf. Hughes, *Recoding*, supra note 152, at 927 (arguing that consumers have an interest in having stable meanings).

300. See, e.g., Castle Rock Entm't, Inc. v. Carol Pub'l'g, Inc., 150 F.3d 132, 145-46 (2d Cir. 1998).

301. See Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979).

302. *Id.* at 758.
considered time as a factor in the fair use analysis, the result might well have been different. A court would have noted that Disney had by that time enjoyed more than forty years of copyright protection for Mickey Mouse, a significant time period within which to earn a return and develop various sequels and other properties based on the original creative work. Moreover, Mickey Mouse had attained a certain status and cultural significance. This, weighed against the various other factors, could well have been sufficient to tip the case and result in a finding for the defendants. By the same token, had the same case arisen in the 1930s, shortly after the initial creation of the work, the analysis suggested here might well have led to a different result.

Finally, consider an example of a derivative, but non-critical, use. In *Castle Rock Entertainment v. Carol Publishing,* the owners of the copyright in the popular television comedy *Seinfeld* sued an author for publishing a book called *The Seinfeld Aptitude Test,* which contained trivia questions about facts from the television sitcom. The Second Circuit held that the book was a derivative work and rejected a fair use argument. The rejection of the fair use defense was based in part on the relatively well-established rule that, in assessing the harm to the market, a court should look not only to the market for the work itself (in this case the television show), but also the market for derivative works (such as books based upon the television show). This consideration of the derivative market is supported by the idea that a copyright owner should be given an opportunity to exploit the work through licensing or the creation of derivative works. At the same time, however, this right permits copyright holders to limit efforts by others to build upon the work, raising concerns that the original author may use this right to suppress or limit creative transformation.

Consideration of time in such derivative-works cases would permit courts to vary the scope of this right over time and thereby achieve a finer balance between these competing concerns. Thus, where the work is older, noncritical derivative works should have freer rein, since the copyright owner will have had ample opportunity to develop such works on his or her own, and the work will be an attractive subject for adaptation. Moreover, the incentive impact of finding less pro-

303. Actually, the air pirates parody of Mickey Mouse was based on a later version of Mickey Mouse (with features differing somewhat from the original Steamboat Willie), so the actual time period might be less than forty years.

304. See Gordon, supra note 114, at 1603; Jessica Litman, *Mickey Mouse Emeritus: Character Protection and the Public Domain,* 11 U. MIAMI ENT. & SPORTS L. REV. 429, 434 (1994) ("[O]nce Mickey Mouse becomes a cultural icon, we need to be able to talk about him, sometimes irreverently.").

305. 150 F.3d 132 (2d Cir. 1998).

306. *Id.* at 135

307. *Id.* at 144-46.
tection will be minimal. Where a work is relatively young, however, the scope of such use would be comparatively less.\textsuperscript{308} Thus, consideration of time in the \textit{Seinfeld} case would have lent additional support toward a finding of no fair use, since the works are so new. However, the exact same facts applied to an older work would probably reach a different result. For example, a \textit{Gone With the Wind Aptitude Test}, employing the exact same format as the \textit{Seinfeld Aptitude Test}, would probably constitute fair use.\textsuperscript{309}

Many other actual cases illustrate the same overall point: that consideration of time could change the results in a significant number of fair use decisions. For example, recent fair use cases involving older copyrighted works include claimed fair uses of the following works: the movie character James Bond (who first appeared in film in 1962);\textsuperscript{310} the works of Scientology founder L. Ron Hubbard (written in the 1950s);\textsuperscript{311} \textit{The Cat in the Hat} by Dr. Seuss (published in the 1950s);\textsuperscript{312} the Star Trek television series (first aired in 1966);\textsuperscript{313} the Godzilla movies (created in 1954);\textsuperscript{314} and the films of Laurel and Hardy (from 1929).\textsuperscript{315} In each of these cases, the age of the work would have lent additional support to the fair use argument, and would likely have changed the ultimate results in a number of them. These examples illustrate how time would affect the scope of copyright protection for older works.

In response to the above examples, it could be argued that the proposal gets it exactly backwards by affording potentially more pro-

\textsuperscript{308} Note that this analysis does not say anything about whether the case was rightly decided as an initial matter (particularly on the derivative work issue). Only that the relative youth of the underlying work would have undercut the fair use argument. See Ginsburg, \textit{supra} note 154 (discussing these cases).

\textsuperscript{309} Or, for a concrete recent example, consider \textit{Toho Co. v. William Morrow & Co.}, 33 F. Supp. 2d 1206, 1217 (C.D. Cal. 1998), which involved a book containing facts, pictures, and plot summaries from the Godzilla movies, which were first shown in the 1950s.


\textsuperscript{311} \textit{Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.}, 923 F. Supp. 1231, 1249 (N.D. Cal. 1995) (no fair use for posting the writings of L. Ron Hubbard, which were written in the early 1950s).

\textsuperscript{312} \textit{Dr. Seuss Enters. v. Penguin Books U.S.A., Inc.}, 109 F.3d 1394, 1403 (9th Cir. 1997) (no fair use of Dr. Seuss style to retell O.J. Simpson double-murder story, where Dr. Seuss books first appeared in the 1950s).


\textsuperscript{314} \textit{Toho Co.}, 33 F. Supp. 2d at 1217 (no fair use for book containing facts, pictures, and plot summaries from the Godzilla movies, where Godzilla created in 1954).

\textsuperscript{315} Richard Feiner & Co. v. H.R. Indus., Inc., 10 F. Supp. 2d 310, 315 (S.D.N.Y. 1998), \textit{vacated mem.} 182 F.3d 901 (2d Cir. 1999) (no fair use for commercial use of colorized photo of Laurel and Hardy, which was taken in 1929).
tection for younger works. That is, the ability to contest or challenge the cultural meaning of a work through parody or transformation is most important early in the life of a work, and insulating the work from such early critique would unfairly silence or hinder competing perspectives. Thus, for example, a parody of the Harry Potter books or the Star Wars films might be most appropriate now, when these works are prominent in the public consciousness. Limiting such transformative uses to the end of the copyright term risks permitting such uses only when they are far less relevant.

As an initial matter, the proposal advanced here would not completely insulate newer works from parody or critique. Time would only be one of several factors in fair use analysis and could well be outweighed in many cases (for example, where the use is particularly transformative, and where the impact on the market is likely to be minimal). As in all fair use cases, much would depend on the facts. Thus parody would still be available for newer works and others would still be permitted to contest the preferred meanings of new works. The broader point, however, is that the scope of such use would be comparatively less than that applied to older works. Moreover, such a result is not problematic once one acknowledges not only the societal interest in different perspectives, but also the copyright owner's interests in obtaining a return for her creative labor and in further developing the artistic vision underlying the original work. By altering the scope of protection over time, the proposal permits these interests to be balanced in a more nuanced fashion.

Not only do the above examples, as argued earlier, fit both copyright doctrine and theory, they also seem quite consistent with common sense and our intuitions. Even given identical facts, it seems intuitively right that the scope of fair use for Gone With the Wind should be greater than the scope of fair use for Harry Potter. It seems intuitively appropriate that the ability of third parties to re-cast, transform, and adapt older works should generally be greater than the corresponding right to re-cast newer works. The main difference between these two examples is simply time and what time represents with respect to many of the policy justifications underlying copyright law.

2. Excerpts

Although the transformative uses discussed above probably present the strongest case in support of the proposal, nontransformative uses would also benefit from consideration of time. Consider, for example, the use of excerpts from copyrighted works, that is, incorporating quotes and passages, sometimes extensively, from other works.

316. For example, derivative works that are only minimally parodic might be more permissible for older works and less so for newer ones.
Under the proposal, the ability of subsequent authors to incorporate excerpts from other works would be affected by the age of the work. So, taking the facts from *Harper & Row*, the fact that the work was new would have weighed against a finding of fair use. True, as already discussed, the Court implicitly recognized the impact of time in its general fair use analysis. Recognition of time would, however, have been express under the proposal in this Article, thus providing an easier route to the Court's ultimate result.

At the same time, the result might well have been different under this proposal if the case had arisen fifty years later. That is, assume that a news magazine wished to reproduce the exact same quotes, not to "scoop" the initial publication of the work, but as part of a historical analysis of some of the events described in the memoir. With these same facts, consideration of time would greatly support a finding of fair use, since much time would have passed since the original creation of the work. True, application of standard fair use analysis might also reach the same result. For example, the fourth factor in this case might well flip to favor the defendant because licensing revenues from the initial publication would not be an issue. However, other licensing revenue would still be a concern. Thus, it is not entirely clear that the result would be different under standard fair use analysis. Consideration of time, however, would likely lead to a different result.

Along these same lines, consideration of time could shed light on the use of excerpts of unpublished letters and papers in subsequent works. In a number of cases, courts have grappled with the fair use status of excerpts of unpublished works in unauthorized biographies, like the publication of personal letters in an unauthorized biography of J.D. Salinger. As a general matter, courts have given significant weight to the unpublished status of the work in rejecting claims of fair use. This is in part out of the concern with financial incentives dis-

318. See id. at 551-55.
319. Of course, there could well be cases where excerpting is still justified even for new works. For example, where an excerpt is necessary to comment on an issue that is particularly timely or newsworthy. Although the age of the work would tilt against fair use, other considerations might well outweigh that factor.
320. See *Landes, supra* note 247, at 111.
322. See, e.g., *Salinger*, 811 F.2d at 95-99; 2 *GOLDSTEIN, supra* note 5, § 10.2.2.2(b).
discussed above, but in part also out of an apparent concern with the privacy interests of the individuals. Historians and other scholars have expressed concern that these decisions might hinder their ability to study and write about figures of historical interest.

Consideration of time would provide a way of balancing these competing interests. In such cases, the unpublished status of a work would continue to weigh against a finding of fair use, but the age of the work would also factor into the analysis. Thus, where the unpublished work is relatively new, consideration of time would reinforce a finding of no fair use. So, for example, there would be more limited fair use of recent unpublished letters. However, where the unpublished work is older, consideration of time would weigh in favor of fair use, counteracting the unpublished status of the work. Thus unpublished letters dating from the 1940s would be subject to greater fair use than recent letters. Again, this result finds support in the general policies underlying copyright law. When an unpublished letter or manuscript is new, the author's interests, whether financial or privacy-related, are generally the greatest. As the decades pass, these interests wane, while the broader societal interest in studying, reporting, and disseminating excerpts from these works increases. Again, time would permit a more nuanced consideration of these underlying copyright interests.

3. Personal Uses

The examples above all involve the use of a work by a subsequent author. The proposal in this Article, however, could also be applied to personal uses by consumers as well. Examples of this type of use include taping songs from a CD for use in one's car stereo (so-called "space shifting"), taping on-air television broadcasts for later viewing (so-called "time shifting"), and photocopying newspaper or magazine articles for personal use or study. The same basic rules discussed above would apply to these cases. Thus, where a work is relatively old, courts would permit a greater degree of personal copying. Conversely, where a work is new, courts would permit comparatively less freedom for personal copying.

323. See Landes, supra note 247, at 111 (analyzing economic interests).


326. Again, this is a generalization. There might well be cases where such letters are so newsworthy (for example, a private letter of a public government official concerning a matter of public interest) that these factors are outweighed by the other fair use factors.
Again, consideration of time would not by itself be dispositive. Thus, the other factors might outweigh time or dictate the same result whether time is considered or not. Indeed, since some of the uses may already be privileged by the fair use defense or under other statutory exemptions, consideration of time might not materially change the results. For example, take the question of personal copying of television broadcasts for purposes of time-shifting, the issue raised in *Sony v. Universal City Studios*.

The proposal in this Article suggests that the scope of fair use for such broadcasts should depend on the age of the copyrighted work. Thus, time-shifting of older shows from the 1950s would be subject to greater privilege than similar copying of very recent shows. However, since the Supreme Court held in *Sony* that time shifting in general is fair use, consideration of time would not add anything to the analysis.

In cases closer to the line, however, time would make more of a difference. For example, consider private taping of on-air television broadcasts, not for time-shifting, but instead for building up a home library for repeat viewing. The Supreme Court in *Sony* expressly declined to rule on this issue, and the fair use status of this activity is very much in question. Or consider personal taping of CDs borrowed from friends for purposes of building up a collection. Time could well make a difference in the fair use analysis. The ability to make personal library copies of older works, say music from the 1930s (for example, an old recording of a Cole Porter song) or classic television shows from the 1950s (for example, the *Honeymooners*) or old magazine articles (for example, *Life* magazine), would be greater than the right to make similar copies of newer works, such as the new Eminem CD or the latest episode of *Friends*.

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328. Note there is disagreement over the validity of this type of “consumptive” fair use. See Jane Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J.L. & ARTS 1 (2000).


330. That is, assuming the Supreme Court does not see fit to revisit the issue. Note that this is not an objection to the proposal in general, since time in this respect is no different from the other fair use factors, which might or might not figure heavily in the fair use analysis, depending on the specific facts of the case.

331. 464 U.S. at 421.

332. This argument assumes these works are not copy-protected. If they are, there may be a limit on the ability of the individual to exercise his or her fair use rights. This limit would be both technological, in the form of the copy-protection, and legal, since circumventing the copy protection would give rise to a violation of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. §§ 1201-05 (2000). The DMCA would be violated even if the individual had a fair use privilege to copy the protected work, since the DMCA, unlike the Copyright Act more generally, contains no general fair use exception. See *Universal Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 321-24 (S.D.N.Y. 2000), aff'd, 273 F.3d 429 (2d Cir. 2001).
Again, this would be justified by the fact that the ex ante impact of such copying on incentives would be much less for the older work. In addition, the older work is more likely to be a work of historical or cultural interest, such that we would want to encourage wide dissemination. Finally, the costs of securing licenses for small-scale personal copying would be expected to increase for older works, and indeed might be prohibitively expensive for works that are no longer actively distributed. This last consideration is particularly important given that the costs of seeking permission to engage in personal copying could, for older works, easily exceed the value of the use. Conversely, these interests have comparatively less relevance for newer copyrighted works. Time would again serve as a proxy for these interests and permit tailoring of copyright scope over time for personal copying.

Consideration of time also has the unexpected benefit of shedding some interesting light on a long-standing puzzle involving the intersection of personal copying and new technology. The case American Geophysical Union v. Texaco nicely illustrates this puzzle. In that case, a number of scientific journal publishers brought suit against Texaco for its practice of systematically circulating these journals among its research scientists and permitting them to make photocopies of articles for their files. The court in American Geophysical rejected a fair use defense. In so doing, the court pointed to the availability of licenses offered by the Copyright Clearance Center, a rights-management organization.

American Geophysical points to a puzzle within the influential market failure justification for fair use. As described above, under this justification, fair use should generally be permitted in cases where the cost of securing a license exceeds the value of the use. Under such circumstances, fair use is an appropriate response to market failure caused by the existence of transaction costs. However, this justification is complicated by the potential emergence of private rights-clearance organizations that could reduce the costs of licensing. Examples of

333. See Gordon, supra note 243.
334. 60 F.3d 913 (2d Cir. 1994).
336. 60 F.3d at 918-32.
337. Id. at 929-31.
338. See 2 GOLDSTEIN, supra note 5, § 10.1.1; Gordon, supra note 243.
such organizations include BMI\textsuperscript{339} and ASCAP\textsuperscript{340} for music licensing and the Copyright Clearance Center for journal copies. These organizations reduce the costs of licensing by providing blanket licenses that permit certain uses of works and by monitoring these uses for compliance with the terms of the licensing agreements.\textsuperscript{341} Where such organizations exist, as in \textit{American Geophysical}, the market-failure justification for fair use may be undercut since licenses are easily available.

The puzzle arises when courts are forced to deal with fair uses involving new copying technologies. For example, in \textit{Sony Corp. v. Universal City Studios, Inc.},\textsuperscript{342} the Supreme Court had to decide whether private taping of television broadcasts for later viewing constituted fair use. Under the market failure view, such taping would be strongly supported given that the cost of an individual securing a license to engage in such use exceeded the value of that use. However, since the decision was handed down only shortly after the VCR was introduced to the market, no organizations had yet arisen to issue such licenses. The decision in \textit{Sony} thus effectively prevented any such organizations from ever arising.\textsuperscript{343} At the same time, it is quite possible that such organizations would never have arisen, given the economics particular to that market. Thus, a court presented with a fair use issue involving new technology is forced at the outset to make a prediction based on inadequate information that might have substantial effects on the structure of an emerging market.\textsuperscript{344}

One response to this puzzle is that courts should err on the side of rejecting claims of fair use, since this gives private licensing institutions a chance to develop.\textsuperscript{345} Since a decision permitting fair use will necessarily prevent the creation of private institutions, courts should be wary of making such a determination without more evidence that there exist structural barriers to the creation of such institutions.\textsuperscript{346} This suggestion, however, is still less-than-optimal, because there may

\begin{itemize}
  \item \textsuperscript{339} Broadcast Music, Inc.
  \item \textsuperscript{340} The American Society of Composers, Authors and Publishers.
  \item \textsuperscript{342} 464 U.S. 417 (1984).
  \item \textsuperscript{343} See Merges, \textit{supra} note 335, at 131; cf. 2 \textsc{Goldstein}, \textit{supra} note 5, § 10.1.1, at 10:7.
  \item \textsuperscript{344} See Richard P. Adelstein & Steven I. Peretz, \textit{The Competition of Technologies in Markets for Ideas: Copyright and Fair Use in Evolutionary Perspective}, 5 INT'L REV. L. & ECON. 209, 210-17 (1985). An analogous (though inverse) situation is raised by predictions that the Internet will greatly reduce transaction costs associated with licensing uses through micro-payments. See Bell, \textit{supra} note 114; Mark Steffik, \textit{Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing}, 12 BERKELEY TECH. L.J. 137 (1997).
  \item \textsuperscript{345} See Merges, \textit{supra} note 335, at 131.
  \item \textsuperscript{346} See \textit{id}.
\end{itemize}
be a cost associated with foregone uses if such institutions do not in fact develop. Individuals will be barred from exercising certain fair uses, and no low-cost licensing mechanisms will permit them to obtain access. Moreover, technology and market responses are notoriously difficult to predict, and courts are often not in the best position to accurately assess the potential for such institutions to develop.

A more satisfactory answer is provided by consideration of time in fair use analysis. By considering time, a court could adjust its finding of fair use depending on when the issue was presented to it. Thus, if a technology is entirely new and it is possible that private licensing schemes might develop, a court could find no fair use in order to give institutions the chance to develop such schemes. By contrast, if a technology has been in place for a long time and no such institutions or licensing schemes have developed, then a court should be more willing to consider a fair use argument, since the failure of such institutions to develop would be evidence that the market will not solve the transactions cost problem on its own. Thus, consideration of time would permit courts to get out of the bind that they are in when faced with fair use claims involving new technologies. Note that in this case, time is being considered, not with respect to the underlying copyrighted works, but rather with respect to the technology. By opening up fair use analysis and making it sensitive to the relevance and impact of time, the proposal would provide this additional benefit.

4. Reverse Engineering

In discussing examples of cases where the proposal in this Article could be usefully applied, it is important also to recognize cases where the application of the proposal would not be appropriate. One such category of cases involves reverse engineering of computer software,
and it is sufficiently important to warrant at least a brief express mention here. Computer software is protected by copyright law as a literary work. However, copyright law has not been an easy fit for software, since software contains functional elements which copyright law is not designed to protect. Thus courts have had to adapt existing copyright doctrines to the peculiarities of computer software, permitting them to protect the creative elements while preventing them from unintentionally protecting the functional aspects of software and thereby reducing competition and innovation.

One way courts have done this is through the fair use doctrine. In particular, the courts have established a fair use privilege to copy software for purposes of reverse engineering in order to make compatible products. Thus, for example, a video game manufacturer is permitted to make copies of a console manufacturer's operating system software in order to study it and make compatible games. Similarly, under certain circumstances, an applications developer should be permitted to reverse engineer an operating system in order to develop a compatible program. This privilege is considered necessary to prevent copyright owners from using copyright law to hinder desirable competition.

The proposal in this Article should not be read to support an argument that reverse engineering should be greater for older works and more limited for new works. This is because the justifications supporting the proposal simply do not apply to the unique circumstances of computer software. First, the current copyright term vastly exceeds the useful life of computer software. Whatever may be said about the appropriateness of a life-plus-seventy term for copyrighted works in general, it is impossible not to recognize that such a term is far too long for computer software, which rarely has a useful life beyond ten years. Thus, to the extent that many of the justifications supporting the proposal rely on changes that occur over the decades of the copyright term, they


352. See Lotus Dev. Corp. v. Borland Int'l, 49 F.3d 807, 820 (1st Cir. 1995) (Boudin, J., concurring) ("Applying copyright law to computer programs is like assembling a jigsaw puzzle whose pieces do not quite fit."); Computer Assocs. Int'l v. Altai, 982 F.2d 693, 712 (2d Cir. 1992) ("Generally, we think that copyright registration — with its indiscriminating availability — is not ideally suited to deal with the highly dynamic technology of computer science.").


354. See Sega, 977 F.2d at 1520.
term, these justifications are inapplicable to the much shorter life of computer software.355

Second, many of the justifications for the proposal are based on the expressive and creative nature of copyrighted works. That is, the justifications based on the desire for transformation, re-use, and re-imagining of copyrighted works are peculiar to expressive works that communicate meaning to an audience. By contrast, computer software is expressive in only the most limited sense. Its primary value is not in the creative expression embodied in the program code, since the code itself does not communicate directly to the audience. Rather the primary value is found in the functional aspects of the program.356 Thus, to the extent that computer software does not involve these expressive considerations, the corresponding justifications simply do not apply.

Third, and more specific to reverse engineering, limiting fair use in the initial years of a software program's term of protection could visit real harm on competitive markets for computer software. The fair use privilege for reverse engineering is necessary to prevent software publishers from using copyright to prevent competition in software markets.357 This competition is particularly important early in the life-cycle of computer software, partly because the life-cycle is so short, and partly because software markets are characterized by strong network effects.358 That is, software programs and platforms can become more valuable when used by more users since this enables users to easily transfer learned skills, permits them to easily share common document formats, and encourages development of valuable compatible programs.359 Because this state of affairs makes it possible for certain programs to become dominant, encouraging compatibility and competition is particularly important early in the lifecycle of these software markets, in order to foster real competition.360

355. See Lessig, supra note 121, at 252 ("Software is a special case. The current [term of] protection for software . . . is a parody of the Constitution's requirement that copyright be for 'limited Times.' . . . The term of copyright for software is effectively unlimited.").


357. See Peter S. Menell, An Analysis of the Scope of Copyright Protection for Application Programs, 41 STAN. L. REV. 1045 (1989).


Thus, for the above reasons, the proposal in this Article is not applicable to cases involving reverse engineering of computer software, largely because of the unique aspects of copyright protection of computer software. Although the proposal in this Article would have substantial benefits when applied to the vast majority of copyrightable works, it is important to acknowledge this one specific limitation on the scope of the proposal.

B. Objections

A number of objections could (and will likely) be raised against the proposal in this Article. One objection is that considering time as a factor in fair use analysis will only serve to make copyright entitlements more uncertain. As a general matter, we prefer to have clear entitlements, since clarity reduces both the potential for, and the cost of, disputes. If entitlements are clear, parties will know what their rights are and thereby avoid infringement. And in the cases of infringement that do occur, courts will be able to resolve the issue more expeditiously if a clear rule exists. Moreover, clarity facilitates efficiency by lowering the costs of bargaining. Thus, one practical objection is that adding time to the mix merely muddies the water.

As an initial matter, consideration of time would in fact add little appreciable uncertainty beyond the levels that already exist in copyright law more generally. The fair use defense is notoriously uncertain in scope, since it already involves the case-by-case balancing of four statutory factors. Moreover, the Copyright Act itself expressly contemplates the consideration of additional, unspecified fair use factors. The defense is already quite uncertain in scope, and the consideration of an additional factor would add little marginal uncertainty. Indeed, the uncertainty is the cost associated with the great benefit of fair use analysis, its flexibility. And in giving courts a broad degree of discretion, Congress clearly made a policy choice in favor of flexibility, despite its costs.

In addition, the actual application of time as a factor would be relatively straightforward. Unlike many of the other factors, the content of this new factor would be absolutely clear. That is, the age of a


362. Indeed, the fair use defense has famously been called "the most troublesome issue" in the whole law of copyright." Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).

363. See supra Section III.A.

364. See Hughes, Fair Use, supra note 10 (making same arguments).
work is a fact that can be objectively determined, and that will rarely be the subject of dispute. The date *Gone With the Wind* was published is an established fact, easily discoverable and verifiable. This is not the case with all of the other fair use factors. For example, the impact on the market — arguably the most important factor — is notoriously difficult to quantify and subject to significant uncertainty, particularly when dealing with markets for derivative works. Thus, the new factor has an advantage in that respect.

Moreover, even the weight of this factor is relatively straightforward, insofar as it is a fairly simple sliding scale. The older the work, the greater the scope of fair use. The consideration is essentially a binary one. Although it proceeds along a continuum, from recent to old, from more protection to less, this is no different than any of the other factors. For example, works can be anywhere on the continuum between factual and creative, commercial or noncommercial, transformative or non-transformative. Similarly the amount of the original appropriated can vary from little to much, or anywhere in between. And at least in the instance of time, the factual predicate (that is, the number of years) is unambiguous. Thus, the application of the factor itself would not add much if any additional uncertainty.

Finally, to the extent that consideration of this factor tips the scales in many cases, as in the *Wind Done Gone* case, it may in fact provide a clearer and simpler way of determining the scope of protection. That is, for older works, consideration of time might well make it easier for courts to reach their ultimate decision. True, in other cases consideration of time might make what would otherwise be a clear case a closer case. The point, however, is that we cannot be sure ahead of time whether it would increase or decrease uncertainty. Thus, there is no indication that consideration of time would make fair use analysis more complex or indeterminate, particularly given that it is already extremely indeterminate.\(^\text{365}\)

A second objection is that considering time is inappropriate because time acts as a proxy for other values, and these other values should be considered expressly. If time serves as a proxy for incentives, a court should look directly at incentives. Or if time serves as a

\(^{365}\) A related objection is that the proposal fosters a particular kind of uncertainty by making questions of fair use subject to reexamination, thus undermining a general interest in repose. That is, a defendant who lost a case could simply wait a number of years, then get a second bite at the apple. While it is true that cases might be open to reexamination after a number of years, the practical impact of this will likely be quite minimal. First, cases would only be open to examination after an appreciable number of years have passed, since the policy interests vindicated by the proposal are affected by passage of time measured in decades, not single years. Thus there is really little risk of fair use issues being re-litigated every few years. Second, to the extent that cases are re-litigated not years but decades later, this is a desirable feature of the proposal, not a drawback. That is, by permitting reexamination after many years have passed, the proposal serves the policy interests that have been offered in support of the proposal, since by then, the balance of such interests may well have shifted.
proxy for increased transactions costs, we should determine the scope of such costs directly, as courts sometimes already do. Or if time serves as a proxy for the cultural significance of a work, a court should look directly at that significance. Or if time serves as a proxy for the reward to authors, we should look directly at whether the reward is sufficient. By considering time independently, a court risks applying the factor in cases where it may not accurately reflect the true interest that we are seeking to vindicate.

My response is that time is useful precisely because it serves as a proxy for all of the above considerations. Direct consideration of the interests above would in fact lead to much added complexity in fair use analysis, since assessment of the multiple factors above would be difficult and highly indeterminate. Whether an author deserves more compensation is not something that can easily be answered with any degree of precision. Similarly, the cultural significance of a work, although perhaps easier to determine, is fraught with the type of subjective cultural value judgments that courts in copyright cases prefer to avoid. As I hope to have established above, however, time serves as a very good proxy for compensation to the author, for incentives, for the costs of access, for the cultural significance of the work, and for other important policy justifications underlying copyright law generally. And it obviates the need to consider all of them at the same time.

The proposal thus strikes a pragmatic balance by permitting consideration of all of these interests without adding an unworkable amount of additional complexity. The challenge in proposing a doctrinal change, particularly to an area as confusing and indeterminate as fair use, is coming up with one that adds significant benefits without introducing too much in the way of costs, including costs associated with administrability. The proposal in this Article is already open to the criticism that it is making an already indeterminate issue even more indeterminate. As I have indicated above, I do not believe this to be the case. But it certainly would be the case if, instead of simply

366. See, e.g., Note, supra note 10, at 1210-15 (proposing that courts expressly consider the amount of compensation that the author has received).

367. See, e.g., Note, supra note 10, at 1215 (proposing express consideration of whether a work has achieved "iconic" status, although acknowledging that this determination may be difficult).

368. Indeed, our copyright system is designed in many ways so that we can avoid addressing this question. Under our system, the "value" of a work is measured by the market, see Netanel, supra note 107, which may or may not correspond to social value, cultural importance, or desert to the author. See BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 144 ("In any case, copyright as a general matter is a poor vehicle for insuring 'due rewards.' Economic success and cultural value do not perforce coincide.... Nor is there any necessary correlation between this return and the moral deserts of the creator.").

considering time as an additional factor, courts were instead asked to consider questions such as the cultural significance of a work or the appropriate amount of compensation deserved by an author. By using time as a proxy, the proposal permits consideration of many of the complicated underlying policy concerns in the context of a relatively easy-to-administer additional factor in fair use analysis.370

Of course, time is not a perfect proxy for these underlying interests. For example, one could imagine a case where a painter toiled away in obscurity for much of his life, only to achieve fame well after his death in the last ten years of the copyright term. Under such circumstances, time is not an accurate measure of desert or of compensation.371 Similarly, many old works may have little or no cultural significance, and thus not be desirable subjects for transformation or re-imagination. Or take the question of transaction costs. Although in many cases, the age of a work may be correlated with costs associated with securing licenses, in other cases there may be no such correlation, for example where a work is still being actively licensed near the end of its copyright term. Thus there may well be cases where time does not perfectly reflect the underlying copyright interests.

Time will be a good proxy in many cases, however, and the benefits of considering time as an easy-to-administer mechanism for getting at these underlying interests is sufficient to justify its application as a general rule (though always subject to modification if exceptional circumstances arise). Indeed, many of the existing fair use factors are themselves proxies for underlying copyright interests. For example, the nature of the work, the amount copied, and the nature of the use are not themselves relevant copyright values. Instead, they serve as proxies for underlying values such as the potential harm to incentives, the societal benefits from the use, etc. Thus, even with the standard fair use factors, there may be situations where a given factor does not adequately serve as a proxy for underlying copyright values.372 Indeed, even the copyright term is a proxy, since it is always possible that a work may become commercially famous after the term of protection has expired. Despite these possibilities, we do not dismiss these considerations since, by and large, they do a good job of approximating the values that we are concerned with. Such is the case with time.

370. See BARD & KURLANTZICK, COPYRIGHT DURATION, supra note 4, at 52 n.70 (noting that varying term work-by-work, though perhaps theoretically optimal, would be administratively impossible, and suggesting fair use as an alternative measure of tailoring protection).

371. Of course, the compensation in this example would go to the author's heirs, since he or she would be long dead by this time.

372. See, e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (dismissing the "nature of the work" factor and substantially qualifying the "amount copied" factor to adapt it to the case of parody); Sega Enters. v. Accolade, 977 F.2d 1510 (9th Cir. 1993) (creatively interpreting the "amount copied," "commercial use," and "harm to market" factors to fit the peculiarities of reverse engineering).
A third objection is that the proposal in this Article is too vague and ill-defined to have an appreciable impact on the scope of fair use. Under this view, time will not contribute measurably to fair use analysis (beyond the extent to which it may or may not already be taken into account in the other factors) or make a difference in enough cases to make it worthwhile for courts to even engage in the analysis. As I hope I have shown above, however, the added cost of considering time is quite minimal, since the test for time is rather easy to administer. Moreover, as the examples above point out, consideration of time could in fact lead to different results in an appreciable number of cases.

True, the impact of time would be felt incrementally as courts apply the rule in a case-by-case fashion. The impact of this change would not be as dramatic as the invalidation of term extension, which would immediately affect a huge number of works, casting them clearly into the public domain. Instead, the impact of the proposal would develop over time, as parties adopt the argument in their briefs, as individual courts (hopefully) accept the argument, as third parties read and internalize the resulting decisions, and as these third parties change their behavior in response to the change in the law. However, in many ways, this is a strength of the proposal, since it permits courts to inject such considerations in a case-by-case fashion, to which courts are more accustomed. It permits courts to work out the implications of this change and to refine it as they apply it to specific cases. And over the long term, the impact of the change would be substantial, insofar as it would become clear that older works are subject to a greater scope of fair use.

I expect that owners of valuable long-standing copyrights will have strong objections to the proposal in this Article. It's not hard to see why. The Disney corporation, for example, derives a tremendous amount of revenue from its copyrights in Mickey Mouse, Minnie Mouse, Donald Duck, Goofy, and the rest. The analysis in this Article suggests that Mickey should be subject to greater scope of fair use. Although Disney might be upset at this prospect, the general public should be delighted. Mickey has already received more than seventy years of exclusive copyright protection and, on top of that, a twenty-year reprieve under the copyright term extension act. Walt Disney and his descendants have been amply rewarded for Mr. Disney's original creative labor. No authors witnessing a slightly greater scope of fair use.

373. Fair use can be an easy out for those who would like to see changes in the scope of copyright protection, insofar as it leaves to the courts the task of implementing proposed changes through exercise of their discretion, and does not require too much uncomfortable specificity in detailing such changes. In this case, however, the proposal is an extremely concrete one and would modify fair use analysis in a discrete and particular way.

374. See Litman, supra note 304, at 431-32.
use of Mickey Mouse would be deterred from creative labor by the prospect of reduced incentives. The Disney corporation has had ample time to exploit and build upon the original cultural property. And now it's time for others to have a crack at Mickey.

**CONCLUSION**

This Article has argued that courts should consider time when deciding whether a use is fair. The copyright act itself expressly permits courts to consider additional factors in fair use, and extremely strong policy justifications support such a consideration. By considering time as a factor in fair use analysis, courts can achieve a more finely-tuned balance of the various justifications underlying copyright law more generally, one that recognizes the impact of time on the proper scope of copyright protection.