

The Beat Should Not Go On: Resisting Early Calls for Further Extensions of Copyright Duration

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The campaign began even earlier than I thought it would. No, not the 2008 presidential campaign, although that one began far too early as well. Instead, I mean the campaign for yet another extension of copyright duration.

Mark Helprin, an accomplished novelist, short-story writer, essayist, and political commentator,¹ fired an opening salvo in this campaign with a 2007 op-ed, *A Great Idea Lives Forever. Shouldn't Its Copyright?*² Mr. Helprin offers what, at first glance, might seem a sensible proposal for lengthening copyright duration. Closer analysis reveals, however, that Mr. Helprin's proposal rests on a shaky foundation of inapt analogies and questionable public policy notions. In addition, his arguments contemplate a congressional resort to gimmickry that would undermine the balance contemplated by the U.S. Constitution's Copyright Clause, the source of congressional power to legislate copyrights.³

This Article rejects Mr. Helprin's position on extending copyright duration. After necessary background discussion, the Article examines the problems presented by the Helprin proposal⁴ and similar proposals that will be made during the coming years.⁵ The Article also exposes the

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1. For biographical information on Mr. Helprin and a list of his novels and other writings, please see his website at <http://www.markhelprin.com>.

2. Mark Helprin, Op-Ed., *A Great Idea Lives Forever. Shouldn't Its Copyright?*, N.Y. TIMES, May 20, 2007, § 4, at 9, available at <http://www.nytimes.com/2007/05/20/opinion/20helprin.html>.

3. U.S. CONST. art. I, § 8. See Helprin, *supra* note 2. For a critical analysis of the Helprin proposal, see *infra* text accompanying notes 18-80.

4. See *infra* text accompanying notes 25-80.

5. The history of copyright duration extension makes it a certainty that additional duration extension proposals will be forthcoming. See Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 436, 450 (2007); Kenneth D. Crews, *Copyright Duration and the Progressive Degeneration of a Constitutional Doctrine*, 55

deficiencies in arguments made by duration extension proponents and explains why calls for further extensions of copyright duration must be resisted.⁶

I. Copyright Basics

A brief discussion of copyright basics must precede an examination of the problems associated with the Helprin proposal. Copyright protection attaches to books, other writings, musical compositions, recordings, works of visual art, and a broad range of other works of authorship.⁷ A copyright does not protect the underlying themes, ideas, or facts presented in the work.⁸ Instead, the copyright protects the *expression* of those themes, ideas, or facts.⁹ As a general rule, it is infringement to use expression from a copyrighted work without the copyright owner's permission.¹⁰ However, the fair use doctrine, which will not be explored in depth here, creates exceptions to this general no-borrowing rule in appropriate instances.¹¹

Because Article I, Section 8 of the Constitution, the Copyright

SYRACUSE L. REV. 189, 233 (2005); Arlen W. Langvardt & Kyle T. Langvardt, *Unwise or Unconstitutional?: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit*, 5 MINN. INTELL. PROP. REV. 193, 282-88 (2004).

6. See *infra* text accompanying notes 81-187. The most recent duration extension was the Sonny Bono Copyright Term Extension Act of 1998, 17 U.S.C. §§ 302, 304 (2000).

7. 17 U.S.C. § 102 (2000).

8. *Id.*

9. See *id.* Brief note should be taken of the headline attached to Mr. Helprin's op-ed: *A Great Idea Lives Forever. Shouldn't Its Copyright?* Helprin, *supra* note 2. If read by itself, the headline might seem to suggest not only an erroneous belief that copyrights protect ideas but also a proposal that such idea-protection be made perpetual. Alternatively, the headline might seem to indicate a proposal for perpetual copyright protection for ideas, even if ideas are not presently protected. See *id.* In fairness to Mr. Helprin, however, the text of his op-ed reveals his understanding of—and lack of quarrel with—the rule that ideas in a copyrighted work are unprotected, whereas expression in the work is protected. See *id.* Mr. Helprin argues for effectively perpetual copyright protection, but not for making ideas part of what a copyright protects. See *id.* Any indications to the contrary in the headline can be chalked up to the likelihood that an editor, rather than Mr. Helprin, wrote the headline.

10. 17 U.S.C. §§ 106, 501.

11. *Id.* § 107. If a court holds that the defendant's use of the plaintiff's copyrighted work amounted to fair use, the defendant is not liable even though the copyright owner did not grant permission for the use. See *id.*; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994). In determining whether a use is a fair use, courts must weigh and balance four factors: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion of the work used in relation to the work as a whole; and the effect, if any, on potential markets for the copyrighted work. *Id.* For an example of the weighing and balancing done by courts in fair use cases, see *Campbell*, 510 U.S. 569. Limited discussion of the fair use doctrine appears later in this Article at *infra* text accompanying notes 121-125.

Clause, specifies that copyright protection granted by Congress must be for a “limited” time,¹² Congress cannot make copyright protection perpetual.¹³ Copyrights, however, last a very long time, as will be seen in the immediately following section dealing with the problematic nature of the Helprin proposal.¹⁴ When a copyright expires, the underlying work enters the public domain.¹⁵ Anyone may use any or all of the expression from a public domain work and may do so for any purpose, including a profit-making one.¹⁶ Mr. Helprin does not like this outcome. He argues emphatically, albeit unjustifiably, for lengthening copyright duration and postponing the date when public use rights supplant those of the copyright owner.¹⁷

II. What’s Wrong With the Helprin Proposal?

To illustrate how long copyrights last and to place the duration extension proposal in proper perspective, consider the example of Mr. Helprin’s 1983 novel, *Winter’s Tale*.¹⁸ *Winter’s Tale*’s copyright has existed for roughly a quarter-century, will continue throughout Mr. Helprin’s life,¹⁹ and will last for another seventy years beyond his passing.²⁰ The “life-of-the-creator-plus-seventy-years” rule came courtesy of the Sonny Bono Copyright Term Extension Act of 1998,²¹ which modified what had been a life-plus-fifty-years rule by tacking on twenty years to the term of copyrights concerning works created in 1978 or later.²² Mr. Helprin has thus already been granted a twenty-year

12. U.S. CONST. art. I, § 8. The Copyright Clause grants Congress the power to “promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” *Id.* In later quotations of Copyright Clause language, I will use lower-case first letters instead of the capital first letters sometimes used by the Framers.

13. *Id.*; *Eldred v. Ashcroft*, 537 U.S. 186, 199-200, 208, 209-10 (2003); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003).

14. See *infra* text accompanying notes 18-33.

15. *Dastar*, 539 U.S. at 31, 33-34.

16. See *id.*

17. See Helprin, *supra* note 2.

18. MARK HELPRIN, *WINTER’S TALE* (Harcourt Brace Jovanovich 1983).

19. Mr. Helprin was born in 1947. Mark Helprin Biography, *available at* <http://www.markhelprin.com/index.cfm?page=biography>.

20. 17 U.S.C. § 302(a) (2000).

21. Sonny Bono Copyright Term Extension Act of 1998, 17 U.S.C. §§ 302, 304 (2000) [hereinafter CTEA].

22. 17 U.S.C. § 302(a) (1976), *amended by id.* The “life-plus” rule governs duration of copyrights on most works created in 1978 or later. *Id.* However, there is a special duration rule—ninety-five years from first publication or 120 years from creation, whichever comes first—for copyrights on works-made-for-hire if those works were created in 1978 or later. *Id.* § 302(c). Because corporations are often the legal creators of, and hence owners of copyright on, works-made-for-hire, a duration rule other than “life-plus” makes sense. See *id.* The ninety-five-year and 120-year figures noted above

duration bonus over and above the copyright term contemplated by the law in existence when he wrote *Winter's Tale*. In all likelihood, the copyright on *Winter's Tale* will exist for a total of at least 100 years, and perhaps considerably more.²³ But why stop there, Mr. Helprin asks. Why not extend the duration again?²⁴

The reasons to reject further extension become clearer if we consider a much older, yet still copyrighted, work: the 1928 "Steamboat Willie" cartoon, which marked the initial appearance of the Mickey Mouse character.²⁵ The Steamboat Willie copyright, owned by the Walt Disney Co.,²⁶ is governed by a different duration rule that applies only to pre-1978 works and contemplates a basic term plus a renewal term.²⁷ The law in existence in 1928 called for a maximum of fifty-six years of copyright protection, which represented the total of the basic term plus the renewal term.²⁸ If not for a mid-1970s copyright duration extension that added nineteen years to the duration of still-existing copyrights, Disney's Steamboat Willie copyright would have expired at the end of 1984, and the cartoon would, therefore, have entered the public domain at that time.²⁹ The nineteen-year extension meant that the Steamboat

resulted from the CTEA's addition of twenty years to the seventy-five-year and 100-year figures that previously governed the duration of copyrights on works-made-for-hire if they were created in 1978 or later. *Id.*

23. The CTEA applied retrospectively to still-copyrighted works created prior to the CTEA's enactment, and prospectively to works created after the statute's enactment. *See* CTEA, *supra* note 21; *Eldred v. Ashcroft*, 537 U.S. 186, 193, 198 (2003). Hence, the life-plus-fifty-years duration that applied to Mr. Helprin's 1983 novel when he wrote it became life-plus-seventy-years with the enactment of the CTEA. *See* 17 U.S.C. § 302(a). Assuming the sixty-year-old Mr. Helprin, *see supra* note 19, lives the long life we hope he will have, the copyright on *WINTER'S TALE* should have a total duration that easily exceeds 100 years. *See* 17 U.S.C. § 302(a).

24. Helprin, *supra* note 2.

25. Walt Disney Co., <http://disney.go.com/vault/archives/characterstandard/mickey/mickey.html>.

26. *Id.*; <http://home.disney.go.com/guestservices/faqs>.

27. *See* 17 U.S.C. § 304 (2000). The text's reference to "a different duration rule [for] pre-1978 works" is a slight oversimplification, though a harmless one in this context. The basic term-plus-renewal-term approach governs the duration of copyrights on works that were created *and published* prior to 1978. *Id.* Because the Copyright Act of 1976 moved to a "life-plus" approach for copyrights on works created in 1978 or later, *see id.* § 302(a), a special duration rule was developed for works created prior to 1978 but not published until 1978 or later, *see id.* § 303. Because that special rule is of limited applicability and is not germane to the purposes of this Article, it will not receive further discussion.

28. Copyright Act of 1909, ch. 320, § 24, 35 Stat. 1075, 1080-81, *amended by* Copyright Act of 1976 (current version at 17 U.S.C. § 304 (2000)). The basic term and renewal term were then each twenty-eight years in length. *Id.* § 23. Failure to take the necessary steps to renew during the last year of the basic term meant that the work entered the public domain at the end of the basic term. *See id.* § 24.

29. *See* Copyright Act of 1976, ch. 3, § 304, 90 Stat. 2541, 2573 (1976) (current version at 17 U.S.C. § 304 (2000)). Under this mid-1970s' enactment, the renewal term

Willie copyright would have expired at the end of 2003—except that the CTEA came to the rescue in 1998 by granting a twenty-year duration bonus to all still-existing copyrights.³⁰ As a result, the Steamboat Willie copyright will continue in force through 2023.³¹

The duration extensions just described have given Disney quite a deal: ninety-five years of copyright protection, even though fifty-six years was the maximum contemplated by the law when the Steamboat Willie cartoon came into being.³² The duration extensions have been far from a good deal for the public, which must continue seeking permission from, and paying royalties to, Disney³³ in order to make uses that should have become permission-free long ago.

Of course, unlike Disney and the Steamboat Willie situation, the real benefits of the CTEA's twenty-year duration bonus have not yet kicked in for Mr. Helprin and his eventual heirs. The fundamental issue, however, is the same. Should Congress continue to extend copyright duration, not only for works created after the effective date of the extension but also for already-created works that are still under copyright protection at the time the extension goes into effect?³⁴

that had been twenty-eight years became forty-seven years, thus making seventy-five years of protection available (twenty-eight-year basic term plus forty-seven-year renewal term). *Id.*

30. See 17 U.S.C. § 304(b) (2000). The renewal term that had already been increased from twenty-eight years to forty-seven years, *see supra* note 29, became sixty-seven years under the CTEA. See 17 U.S.C. § 304(a), (b). Accordingly, ninety-five years of protection became available (twenty-eight-year basic term plus sixty-seven-year renewal term) for qualifying pre-1978 works. See *id.* As the foregoing discussion reveals, the CTEA's twenty-year duration boost applied to both sets of duration rules under consideration here: the rules for works created and published prior to 1978, and the rules for works created in 1978 or later. *Id.* §§ 302, 304.

31. By obtaining the benefit of both the nineteen-year duration extension that occurred in the mid-1970s and the twenty-year bonus added by the CTEA, Disney's Steamboat Willie copyright enjoys a sixty-seven-year renewal term that is measured from 1956, the year its basic term ended. See *supra* text accompanying notes 25-30; *supra* notes 29-30. The text refers to the Steamboat Willie copyright as existing through 2023 because copyrights run through the end of the relevant calendar year. 17 U.S.C. § 305 (2000).

32. See 17 U.S.C. § 304(b); Copyright Act of 1909 § 24. Not surprisingly, given the economic stakes for the firm, Disney played an influential role in the lobbying effort that led to the CTEA's enactment. See Dennis S. Karjala, *Eldred v. Ashcroft: Intellectual Property, Congressional Power, and the Constitution: Judicial Review of Copyright Term Extension Legislation*, 36 LOY. L. REV. 199, 231, 235 (2002); Langvardt & Langvardt, *supra* note 5, at 201-02, 237-38; Richard A. Posner, *The Constitutionality of the Copyright Term Extension Act: Economics, Politics, Law, and Judicial Technique in Eldred v. Ashcroft*, 55 SUP. CT. REV. 143, 145 (2003).

33. Failure to obtain a license to use or borrow from the still-copyrighted work presumably would make the use or borrowing infringing in nature. See 17 U.S.C. §§ 106, 501 (2000).

34. The CTEA had such dual effects, *see* CTEA, *supra* note 21; *Eldred v. Ashcroft*, 537 U.S. 186, 193, 198 (2003), as did earlier extensions of copyright duration. *Eldred*,

For Mr. Helprin, the answer is an obvious “yes.”³⁵ He created the works through his considerable skills.³⁶ They are his creations, his property.³⁷ Accordingly, Mr. Helprin reasons that he and his heirs (or any transferees of his copyrights) should indefinitely continue to control the works’ use and exclusively derive the financial benefits that attend such control.³⁸ In lamenting the consequence that an underlying work enters the public domain once the work’s copyright expires, Mr. Helprin characterizes this occurrence as a governmental seizure of property.³⁹ He goes on to note an apparent inconsistency: the government does not seize privately owned real estate or other forms of property after a set period of years.⁴⁰ If such “total confiscation” does not occur in regard to those forms of property, he asks, why should it occur in regard to copyrights?⁴¹

Mr. Helprin’s fairness argument has surface appeal but comes up short. Copyright expiration does not amount to a governmental seizure or to “total confiscation.”⁴² The government does not take ownership of the copyright or the underlying work once the copyright duration finally runs out.⁴³ The government acquires no entitlement to the financial benefits that could accompany uses of the work.⁴⁴ Instead, the work is opened up for use by the public,⁴⁵ which includes Mr. Helprin’s distant heirs. If, for instance, they want to publish a new edition of one of Mr. Helprin’s novels after the copyright expires and decide to make that edition especially attractive to the purchasing public by writing a new foreword or other commentary to accompany the text of the novel, no legal obstacle would prevent them from doing so. Others, of course could do the same, as will be seen.⁴⁶ Hence, “total confiscation” does

537 U.S. at 194, 200-01, 204.

35. See Helprin, *supra* note 2.

36. See *id.*

37. See *id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-34 (2003) (citing *Sears, Roebuck, & Co. v. Stiffel Co.*, 376 U.S. 225, 230 (1964), and explaining that upon the expiration of a copyright, the rights to use the underlying work pass to the public).

43. See *id.*

44. See Richard A. Posner, *The Eighth Annual Honorable Helen Wilson Nies Memorial Lecture in Intellectual Property Law: Do We Have Too Many Intellectual Property Rights?*, 9 MARQ. INTELL. PROP. L. REV. 173, 176-78 (2005).

45. *Dastar*, 539 U.S. at 33-34. See, e.g., Crews, *supra* note 5, at 192; Lawrence Lessig, *Re-Crafting a Public Domain*, 18 YALE J.L. & HUMAN. 56, 56-57, 59-60 (2006); Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783, 792-94 (2006).

46. See *infra* text accompanying notes 52-54, 128-137.

not occur.

Moreover, Mr. Helprin's argument fails to consider why owners' rights over their real estate must be perpetual in nature. He appears to assert that the law respects real property owners more than it respects creators of copyrighted works.⁴⁷ But the perpetual nature of rights over real estate has less to do with respect to owners than with the reality that the alternatives—automatic government seizure or opening the property to the public—are neither efficient nor administrable in the real property context.⁴⁸ As for respecting creators of works of authorship, copyright duration rules that contemplate roughly 100 years of rights, or perhaps far more, demonstrate considerable respect.

III. The Creativity-Enhancing Role of the Public Domain

When drafting the Copyright Clause, the Framers of the Constitution contemplated two ways of enhancing creativity, not just one.⁴⁹ The first way—the focus of Mr. Helprin's op-ed—is to give creators substantial legal rights over their creations.⁵⁰ These rights provide creators a presumably powerful incentive to create new works.⁵¹ The other way of enhancing creativity—the one Mr. Helprin fails to note—stems from the “limited times” language of the Copyright Clause. In stating that the “exclusive right[s]” granted to creators must be for “limited times,”⁵² the Framers envisioned the existence of a rich public domain made up of works whose copyrights had expired.⁵³ The public would be free to borrow without restriction from public domain works and to use those works as the foundations of new creative endeavors.⁵⁴

Mr. Helprin seems not to recognize the constitutional importance of

47. See Helprin, *supra* note 2.

48. E-mail from Kyle Langvardt, Esq., to Arlen W. Langvardt (May 25, 2007) (on file with author). See Posner, *supra* note 44, at 176-79, 180-81.

49. See *infra* notes 50, 53.

50. See U.S. CONST. art. I, § 8, cl. 8. See also 17 U.S.C. § 106 (specifying that copyright owners have rights to the reproduction and distribution of their works, the preparation of derivative works, and where appropriate, the performance and display of their works); Helprin, *supra* note 2 (stressing the importance of substantial and enduring rights to those who “try to extract a living from the uncertain arts of writing and composing”).

51. See *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003); Stadler, *supra* note 5, at 433-34.

52. U.S. CONST. art. I, § 8, cl. 8.

53. See *Eldred*, 537 U.S. at 224-25, 227 (Stevens, J., dissenting). See also *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-34 (2003) (commenting on the broad-ranging public use rights that come into play once the copyrights on underlying works expire).

54. See Crews, *supra* note 5, at 229; Lessig, *supra* note 45, at 56-57; William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639, 1639-42 (2004); Stadler, *supra* note 5, at 474-75.

the Limited Times clause.⁵⁵ Perhaps he should not be faulted for this failure or refusal, considering the congressional tendency in recent years to give short shrift to the public domain side of the Copyright Clause's enhancement-of-creativity balance.⁵⁶ By virtue of the CTEA's twenty-year extension of copyright duration, Congress froze the public domain in its pre-1998 state.⁵⁷ No additional works have entered the public domain since the end of 1997; none will do so until the public domain thaw begins on January 1, 2019.⁵⁸ Mr. Helprin would like Congress to

55. See generally Helprin, *supra* note 2. As already noted, Mr. Helprin favors lengthening copyright duration even though doing so would postpone the public's acquisition of the right to make unrestricted uses of works that otherwise would have entered the public domain. See *supra* text accompanying notes 15-17. As will be seen, Mr. Helprin regards the "limited time" language as a convenient vehicle by which Congress may continue to extend copyright duration without making it expressly perpetual. See *infra* text accompanying notes 60-64. His approach would drain the "limited times" language of its more logical meaning and significance. See *infra* text accompanying notes 65-66, 73-77.

56. In addition to the CTEA's soon-to-be-discussed harm to the public domain, see *infra* text accompanying notes 57-66, Congress has taken other actions that restrict the flow of works into the public domain. For instance, concerning copyrights on works created in 1978 or later, Congress adopted a "life-plus" approach and moved away from the basic-term-plus-renewal model applicable to pre-1978 works. See 17 U.S.C. §§ 302(a), 304(a)-(b). One key effect of this change was to limit the rate at which works entered the public domain. See Crews, *supra* note 5, at 229. The life-plus approach meant that copyrights on works created in 1978 or later automatically received the very lengthy life-plus-seventy duration, whereas under the basic-term-plus-renewal model, large numbers of works entered the public domain only after the twenty-eight-year basic term because many copyright owners did not pursue renewal. See Lessig, *supra* note 45, at 59-60; Patry & Posner, *supra* note 54, at 1640. Sometimes the non-renewal occurred because of a copyright owner's slip-up, but presumably, in many instances, non-renewal resulted from the copyright owner's conclusion that the underlying work seemed not to have enough market value to warrant going through the renewal process. *Id.* at 1640. By enacting copyright duration extensions such as the CTEA and by eliminating the renewal feature for copyrights on works created in 1978 or later, Congress struck a "double blow at the public domain." *Id.* at 1640. A related additional blow to the public domain occurred in 1992, when Congress made renewal automatic for any copyrights as to which filing for a renewal otherwise would have been required. See 17 U.S.C. § 304(a); RALPH S. BROWN & ROBERT C. DENICOLA, CASES ON COPYRIGHT 531 (West Group 9th ed. 2005). This meant that for works created and published in 1964 through 1977, the relevant copyrights were guaranteed to receive the benefit of the renewal term even without a filing of a renewal application. See *id.* at 533. Thus, there was no longer any flow of entries into the public domain stream at the end of the relevant copyrights' basic terms. See *id.*; Lessig, *supra* note 45, at 59-60; Crews, *supra* note 5, at 229.

57. Langvardt & Langvardt, *supra* note 5, at 196, 266-67.

58. *Id.* Because copyrights run through the end of the relevant calendar year, 17 U.S.C. § 305 (2000), any copyright that still existed in 1998 received the benefit of the CTEA's twenty-year bonus, see *id.* §§ 302, 304. As a result, any copyright that would have expired at the end of 1998 if not for the CTEA will remain in force through the year 2018. See *id.* Hence, the public domain remains frozen in its pre-1998 state until January 1, 2019. Langvardt & Langvardt, *supra* note 5, at 266-67, 273.

lengthen the freeze by extending copyright duration again and again.⁵⁹

In arguing for further extensions of copyright duration, Mr. Helprin misinterprets the purpose of the Copyright Clause's Limited Times provision, although he does not ignore that language altogether. He refers to the Limited Times provision as evidence of the "genius of the Framers" because it "allows for infinite adjustment. Congress is free to extend at will the term of copyright."⁶⁰ Mr. Helprin goes on to note that Congress "last did so in 1998 [by enacting the CTEA], and should do so again, as far as it can throw."⁶¹

Application of the "genius" label to the Framers may be justified for various reasons, but not for the one offered by Mr. Helprin. He asserts that the Framers included the "limited times" language in the Copyright Clause as a way of allowing Congress, if it were so inclined, to string together successive copyright duration extensions and thereby grant an enormous period of protection that would still be "limited" because it would not be expressly perpetual.⁶² Mr. Helprin's preferred approach seems reminiscent of the questionable copyright duration alternative supposedly suggested by Motion Picture Association of America executive Jack Valenti, and later endorsed by Rep. Mary Bono (R-Cal.): that copyrights should be made to last "forever, less one day."⁶³ In Mr.

59. See Helprin, *supra* note 2.

60. *Id.*

61. *Id.*

62. See *id.*

63. See 144 CONG. REC. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono). This Article will further explore the unwise, and probably unconstitutional, nature of the forever-less-one-day approach. See *infra* text accompanying notes 72-77, 170-171, 177-178. Mary Bono was elected to the House of Representatives to succeed her late husband, Sonny Bono, the songwriter/entertainer/political figure who served in the House from 1994 until his death in an early 1998 skiing accident. Sonny Bono Biography, <http://www.filmreference.com/film/61/Sonny-Bono.html>; CNN Interactive, *Sonny Bono—From TV to D.C.*, Jan. 6, 1998, <http://www.cnn.com/US/9801/06/bono.obit.update/>; Congresswoman Mary Bono, <http://bono.house.gov/Biography/>. Because Sonny Bono had favored lengthy extensions of copyright duration and had backed the bill that became the CTEA, Congress attached his name to the CTEA as a "sentimental" gesture when it enacted the statute in October 1998. Posner, *supra* note 32, at 147.

Sonny Bono had initially favored making copyright duration perpetual before learning that a move by Congress to grant perpetual copyright protection would run afoul of the "limited times" language in the Copyright Clause. See *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989 et al. Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 104th Cong. 94 (1995) (statement of Rep. Sonny Bono); 144 CONG. REC. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono). Mary Bono acknowledged that she had been "informed by staff" of the unconstitutionality of any enactment that would expressly make copyright protection perpetual. 144 CONG. REC. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono). She therefore regarded the CTEA as a good fallback that fittingly honored her late husband and appropriately moved in the direction of extending

Helprin's forever-less-one-day view, the Framers displayed their "genius" by including the Limited Times provision as a means of ensuring Congress a convenient way to negate any meaningful effect that same provision otherwise would have had.⁶⁴ Surely the Framers did not have such pointlessness in mind.

If the Framers intended to empower Congress to grant extension after extension and thereby make copyright protection effectively, if not expressly, perpetual, why would they have included the "limited times" language at all? If the Framers wanted Congress to have completely free reign in regard to copyright duration, they simply would have authorized Congress to enact copyright laws without making any reference to the duration of the rights to be granted. I, therefore, take a different view of the Framers' "genius" in putting the "limited times" language in the Copyright Clause. Rather than including that language as a means of allowing Congress to resort to Mr. Helprin's gimmick of granting extension after extension "as far as [Congress] can throw,"⁶⁵ the Framers chose the "limited times" language as a sensible, meaningful mechanism for establishing the two previously discussed ways of enhancing creativity.⁶⁶

In asserting that "Congress is free to extend at will the term of copyright,"⁶⁷ Mr. Helprin no doubt relies on a 2003 U.S. Supreme Court decision not mentioned in his article: *Eldred v. Ashcroft*.⁶⁸ In *Eldred*, the Court rejected a constitutional challenge to the CTEA, holding that the statute violated neither the Copyright Clause nor the First Amendment's freedom of speech guarantee.⁶⁹ Even a casual reading of *Eldred*, however, reveals the Court's view that the CTEA represented unwise public policy. The CTEA was a bad idea, the Court appeared to

copyright duration even further. *See id.* Ms. Bono commented at the general time of the CTEA's enactment that perhaps Congress should someday consider making copyrights last "forever, less one day." *Id.*

64. *See* Helprin, *supra* note 2.

65. *Id.*

66. As noted earlier, one of the ways to enhance creativity involves providing would-be creators with incentives to create by giving them rights over their creations. The other way involves creating a rich public domain of works from which others may freely borrow once the copyrights on those works expire. *See supra* text accompanying notes 49-54.

67. Helprin, *supra* note 2.

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

69. *Id.* at 193-222. Although detailed discussion of the Court's rationale for sustaining the CTEA against constitutional attack is beyond the scope of this Article, portions of the Court's reasoning in *Eldred* will be noted later herein. *See infra* text accompanying notes 71-76, 174-179; *see also infra* note 155. For extensive analysis of *Eldred*, see Langvardt & Langvardt, *supra* note 5; Posner, *supra* note 32; Paul M. Schwartz and William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Property as Constitutional Property*, 112 YALE L.J. 2331 (2003).

say, but a congressional decision to enact an unwise law does not make that law unconstitutional.⁷⁰

Further, a careful reading of *Eldred* reveals that even though the Court's reluctance to strike down the CTEA signals broad congressional latitude to regulate copyright duration,⁷¹ Congress may not be as free to "extend at will the term of copyright" as Mr. Helprin suggests.⁷² En route to a conclusion that the CTEA did not violate the Limited Times provision in the Copyright Clause because the lengthened copyright terms resulting from the CTEA were not perpetual,⁷³ Justice Ginsburg noted in her majority opinion that there was no indication of a congressional attempt to use the CTEA as a means to "evade or override" the Limited Times provision.⁷⁴ This statement could help fuel constitutional challenges if Congress does what Mr. Helprin wants and strings together successive copyright duration extensions. Any such stringing-together would seem to indicate an intent to "evade or override" the Limited Times provision and could affect the constitutional calculus in a future case, given Justice Ginsburg's observation in *Eldred*.⁷⁵ Add into the mix the gist of the *Eldred* decision—that the CTEA was an unwise enactment even if it was not unconstitutional⁷⁶—and Congress should be too embarrassed to participate in the duration extension charade Mr. Helprin advocates.⁷⁷

70. See *Eldred*, 537 U.S. at 208, 222. In her majority opinion, Justice Ginsburg suggested that the policy determinations made by Congress in enacting the CTEA were "debatable or arguably unwise." *Id.* at 208. She also commended those challenging the CTEA for having "forcefully urge[d] that Congress pursued very bad policy in prescribing the CTEA's long terms," but stressed that "[t]he wisdom of Congress' action . . . is not within our province to second-guess." *Id.* at 222.

71. See *id.* at 199-200, 204-05, 208, 212-13, 216-19, 221-22. The Court's reluctance to rule the CTEA unconstitutional appears to have stemmed in part from concern over the practical consequences of striking down the CTEA and from concern that such an action would imperil the duration extension enacted in the 1970s. See Langvardt & Langvardt, *supra* note 5, at 218, 234, 257-59; Posner, *supra* note 32, at 151-52, 154-55.

72. Helprin, *supra* note 2.

73. *Eldred*, 537 U.S. at 199-200, 208-10. The Court rejected an argument that the "limited times" requirement of the Copyright Clause was violated by the CTEA because the lengthened copyright duration called for in the statute gave copyrights essentially the same economic value that a perpetual copyright would. *Id.* at 209-10.

74. *Id.* at 209; see *id.* at 199-200, 209-10, n.16 (observations to the same effect).

75. See *id.* at 209.

76. See *id.* at 208, 222. *Eldred* can fairly be seen as a decision in which the Court unanimously agreed that the CTEA amounted to poor public policy. Seven justices subscribed to a majority opinion that so indicated, see *id.*, and the two dissenting Justices clearly thought Congress had dropped the ball in enacting the statute. Of course, the dissenters regarded the CTEA as both unwise and unconstitutional, see *id.* at 223-37 (Stevens, J., dissenting); *id.* at 243-66 (Breyer, J., dissenting), whereas the majority saw it as merely unwise, see *id.* at 208, 222.

77. Mr. Helprin is a big name, however. See *supra* text accompanying note 1. Can Congress say "no" to famous creators/copyright owners? See *infra* text accompanying

Mr. Helprin attempts to enhance the appeal of his proposal by casting it as a means of benefiting individual creators, including not only those who have achieved his level of distinction, but also others who have found fame and commercial success more elusive.⁷⁸ Doing so may be good political strategy, but Mr. Helprin fails to mention that corporate copyright owners (*e.g.*, Disney) would also stand to benefit.⁷⁹ If Congress were to take the questionable step of extending copyright duration for individual creators, the Disneys of the world surely would be included as well. Is fattening the bottom lines of Disney and other corporate copyright owners so important that we must again postpone the effective date of the public's Copyright Clause-based entitlement to unfettered use of already long-protected works?⁸⁰

This discussion suggests related questions concerning the effects of extending copyright duration. First, who would really benefit? Second, what types of costs would be imposed on the public if copyrights are continually extended? Third, what sorts of uses of public domain works would be curtailed?

A. *Who Would Really Benefit From a Duration Extension?*

The major beneficiaries of a duration extension would be the very small percentage of copyright owners—whether individual or corporate—whose copyrights apply to works that carry significant economic value in the marketplace for a large number of years.⁸¹ Only two percent of copyrighted works retain commercial value in terms of ability to generate royalties or licensing fees once the works reach fifty-five years of age.⁸² It is safe to assume that various Disney-owned copyrighted works would be within this two percent.⁸³ Mr. Helprin's well-received works⁸⁴ make it reasonable to expect that there will be commercial demand for them for many, many years to come. But with

notes 183-187.

78. See Helprin, *supra* note 2.

79. Corporations own copyrights either because of the work-made-for-hire rule, *see* 17 U.S.C. § 101 (2000), or because of a copyright transfer from the individual who created the work, *see id.* § 201.

80. See U.S. CONST. art. I, § 8. Recall that Disney played a key role in lobbying for the CTEA. See *supra* note 32.

81. See EDWARD RAPPAPORT, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, COPYRIGHT TERM EXTENSION: ESTIMATING THE ECONOMIC VALUES 8, 12, 15 (1998) [hereinafter CRS REPORT].

82. *Id.* Justice Breyer cited this report and the two percent figure in his *Eldred* dissent. *Eldred*, 537 U.S. 186, 248-49 (2003) (Breyer, J., dissenting).

83. Why else, one might ask, would Disney have played a key role in the lobbying effort for the CTEA? See *supra* note 32.

84. See the list of Mr. Helprin's novels, available at <http://www.markhelprin.com>.

the vast majority of copyrighted works retaining little or no commercial value by the time they are fifty-some years old⁸⁵—if they ever had much commercial value to begin with—a very small subset of copyright owners would be the ones receiving almost all of the benefit from the added years of licensing fees that copyright owners could collect if duration were extended.⁸⁶ Of course, some licensing fees might show up on an intermittent basis for owners of copyrights on works that had not been commercially successful for some time, as the occasional users of such works would feel a need to seek permission and pay for a license in order to avoid committing infringement.⁸⁷ The bulk of the cumulative financial haul stemming from a copyright duration extension, however, would go to a select few.⁸⁸

Moreover, though Mr. Helprin likes the idea of using a duration extension as a way to preserve an existing revenue stream for creators' heirs,⁸⁹ protecting creators' distant heirs does not appear to have been a primary objective of the Framers of the Copyright Clause.⁹⁰ If such an objective motivated the Framers, the "limited times" language was an odd choice. That language suggests a prohibition on perpetual or very long-term rights rather than a supposed intent that rights should continue

85. See CRS Report, *supra* note 81, at 8, 12, 15.

86. This was, and continues to be, an effect of the CTEA. See *Eldred v. Ashcroft*, 537 U.S. 186, 248-49 (2003) (Breyer, J., dissenting); Crews, *supra* note 5, at 201-02; Patry & Posner, *supra* note 54, at 1640-41; Posner, *supra* note 32, at 149.

87. See 17 U.S.C. §§ 106, 501.

88. If only two percent of copyrighted works retain commercial value by the time they reach fifty-five years of age, see CRS Report, *supra* note 81, at 8, 12, 15, the "select few" referred to in the text would be, at most, the owners of the copyrights on that two percent. In all likelihood, the select few would be the owners of the copyrights on an even smaller percentage of works, given that as works become much older than fifty-five years, the prospects of their retaining commercial value would seem to diminish even more. With the extension established by the CTEA, not to mention any further extension that Congress might enact, copyrights are already guaranteed to last for lengthy periods that in some instances may easily exceed 100 years. See *supra* text accompanying notes 18-33.

89. See Helprin, *supra* note 2.

90. Although it is obvious that the Framers wanted Article I, § 8 of the Federal Constitution to serve as a grant of power to Congress for the enactment of copyright and patent laws, there is little evidence from the Constitutional Convention of more specific intent on the part of the Framers in regard to the Copyright Clause. See Schwartz & Treanor, *supra* note 69, at 2381-82; Craig W. Dallon, *Original Intent and the Copyright Clause: Eldred v. Ashcroft Gets It Right*, 50 ST. LOUIS U. L.J. 307, 318 (2006). Accordingly, it becomes necessary to infer intent from the Article I, § 8 language, the historical context, and broad public policy positions taken by influential Framers and other statesmen. For an example of such an approach to determining the intent underlying Article I, § 8, see *id.* at 313-24. See also Schwartz & Treanor, *supra* note 69, at 2362-69 (criticizing theories that operate at a high level of generality in their attempts to determine intent underlying Article I, § 8).

long enough for creators' distant heirs to benefit.⁹¹

In this context, it is instructive to consider the duration provision in the Copyright Act of 1790,⁹² which was enacted very shortly after the ratification of the Constitution. With various Framers of the Constitution serving in Congress at the time of the 1790 enactment,⁹³ Congress called for a basic copyright term of fourteen years and an optional renewal term of fourteen years that could be obtained only if the creator lived all the way through the basic term.⁹⁴ Although the living-to-the-end of the basic term provision was later dropped and the basic and renewal terms were subsequently lengthened,⁹⁵ the copyright duration established in the 1790 Act serves as a nearly contemporaneous indication that the Framers were not especially concerned with benefiting distant heirs of creators.⁹⁶ Of course, heirs benefit from copyrights, but they do so as an offshoot of the Framers' goal of enhancing creativity through providing creators with incentives to produce new works. Only in more recent years, when copyright durations have become so lengthy through successive extensions, has the argument about heirs' financial security been seen as a supposed purpose underlying the Copyright Clause.⁹⁷

Remember, too, that Article I, Section 8 grants Congress the power to enact not only copyright laws but also laws regarding the patenting of

91. See U.S. CONST. art. I, § 8. See also, e.g., Dallan, *supra* note 90, at 341 (suggesting that in choosing the "limited times" language of Article I, § 8, the Framers were motivated by a desire to guard against lengthy printing monopolies that had arisen under English copyright law).

92. Act of May 31, 1790, ch. 15, 1 Stat. 124 (differing portions repealed in 1802, 1819, 1831, and 1834).

93. See *Eldred v. Ashcroft*, 537 U.S. 186, 200-01, 213 (2003); Langvardt & Langvardt, *supra* note 5, at 268-69.

94. Act of May 31, 1790, ch. 15, 1 Stat. 124. See Stadler, *supra* note 5, at 439; Langvardt & Langvardt, *supra* note 5, at 197.

95. For summaries of the history of copyright duration extensions from 1831 through the 1998 enactment of the CTEA, see Stadler, *supra* note 5, at 439, 460-63; Crews, *supra* note 5, at 205-07, 228; Langvardt & Langvardt, *supra* note 5, at 196-206; Posner, *supra* note 32, at 144-45.

96. See Act of May 31, 1790, ch. 15, 1 Stat. 124. If the Congress of 1790 had been motivated by a desire to benefit such heirs of creators, they presumably would have crafted the renewal provision differently and would have made it considerably lengthier. See *id.*; cf. Langvardt & Langvardt, *supra* note 5, at 268-69 (arguing that the duration provision in the Copyright Act of 1790 should serve as a nearly contemporaneous indication of what the Framers of the Copyright Clause meant by "limited times"); *Eldred*, 537 U.S. at 200-01, 213 (concluding that early copyright enactments by Congress amount to nearly contemporaneous indications that the Framers of the Copyright Clause would not have objected to retrospective applications of duration extensions).

97. See, e.g., 144 CONG. REC. S12377 (daily ed. Oct. 12, 1998) (statement of Sen. Orrin Hatch (R-Utah) regarding the bill that became the CTEA). Cf. Dallan, *supra* note 90, at 351 (arguing that the Supreme Court's *Eldred* holding was correct in regard to the constitutionality of the CTEA, but that the CTEA, insofar as it was meant to benefit grandchildren of creators, was too heavily weighted in favor of private interests).

inventions.⁹⁸ If preserving distant heirs' ability to profit from their ancestors' copyrighted creations has become so important, would Mr. Helprin like to see patents treated similarly in regard to duration? Would he agree that what is supposedly good for the copyright goose is also good for the patent gander? Patents exist for twenty years from the filing of the patentee's application,⁹⁹ a far shorter duration than for copyrights,¹⁰⁰ and clearly not long enough for distant heirs of the inventor to become entitled to collect royalties. Yet no clamor has emerged for a lengthening of patent duration. Compared with its approach regarding copyright, Congress has paid greater respect in the patent realm to the Article I, Section 8 balance between enhancing creativity through providing incentives to create and enhancing creativity by eventually enabling others to use formerly protected matter as a basis for new creative activity.¹⁰¹

I make no attempt to assert that Congress should drastically slash copyright duration, even on a prospective basis.¹⁰² I also recognize that the less-than-monopoly rights associated with copyrights suggest a need for longer terms than are appropriate for the monopoly rights associated with patents.¹⁰³ Even so, the relatively newfound concern over copyright owners' heirs seems more a transparent attempt to take advantage of lax congressional attention to the public domain's importance in the copyright context¹⁰⁴ than a principled argument rooted in the purposes underlying Article I, Section 8's grant of power to enact copyright and patent laws.

98. See U.S. CONST. art. I, § 8. Article I, § 8 empowers Congress to "promote the Progress of Science and useful Arts, by securing for limited times to Authors *and Inventors* the exclusive Right to their respective Writings *and Discoveries*." *Id.* (emphasis added).

99. 35 U.S.C. § 154(a)(2) (2007).

100. See *supra* text accompanying notes 18-33.

101. See 35 U.S.C. §§ 154, 271 (establishing patent owner's right to exclude others from making, using, or selling a patented invention or substantially similar version until the patent expires). See also *id.* § 112 (requiring a patent applicant to provide a specification setting forth details of the invention, so that a person reasonably skilled in the field can reproduce the invention upon expiration of the patent).

102. A retrospective application of a reduction in copyright duration—i.e., an application to copyrights on already existing works—would raise concerns about unconstitutional takings of property. Crews, *supra* note 5, at 231-32. A prospective application of a duration reduction—i.e., an application to copyrights on works created after the effective date of the reduction measure—would not raise constitutional concerns, but would probably be unrealistic politically. Accordingly, I stop short of advocating a prospective reduction in copyright duration.

103. See *Eldred v. Ashcroft*, 537 U.S. 186, 217 (2003). Compare 17 U.S.C. §§ 106, 107 (granting rights to copyright owner but making those rights subject to fair use by others) with 35 U.S.C. §§ 154, 271 (granting patent owners exclusive rights to exclude others from making, using, or selling a patented invention during existence of patent).

104. See *supra* text accompanying notes 52-66; see *supra* note 56.

B. What Costs Would Result From a Duration Extension?

Next, consider the second of the three questions identified earlier: what types of costs would be imposed on the public if Mr. Helprin's copyright duration proposal were enacted? Costs taking the form of licensing fees for an additional period of years—say, twenty more years, if Congress would choose to follow the regrettable example of the CTEA—have already been noted.¹⁰⁵ For twenty additional years, the public would be expected to pay for the right to use works that should have become freely available for use under the bargain drawn by the Copyright Act.¹⁰⁶ By granting earlier extensions, such as the CTEA and a similar extension in the mid-1970s, Congress has already unreasonably postponed the ability of the public to exercise the rights it is supposed to have.¹⁰⁷ It is no answer to say that there are plenty of works in the public domain already and that successively delaying the entry of further works into the public domain is only a minor inconvenience. The “limited times” language of the Copyright Clause suggests a public domain that is to be continually enriched with new entries as copyrights on underlying works expire.¹⁰⁸ Congress must recognize that the Copyright Clause contemplates rights not only for copyright owners but also for the public.¹⁰⁹ The public's rights were shuttled aside when Congress enacted extensions to copyright duration.¹¹⁰

The economic costs of additional years of the licensing fees described above would likely be in the hundreds of millions of dollars each year.¹¹¹ When one remembers the previously noted objection that a very small percentage of copyright owners would realize the bulk of the financial gains from a copyright duration extension,¹¹² the imposition of such substantial costs on the public becomes especially hard to justify. In forcing the public to yield a use right it is entitled to have so that an

105. See *supra* text accompanying notes 29-34.

106. See *id.*

107. See *supra* text accompanying notes 18-34.

108. See U.S. CONST. art. I, § 8.

109. See *id.* See also *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-34 (2003) (noting the importance of the public's right to make unrestricted use of works when copyrights on them expire).

110. See *Crews*, *supra* note 5, at 228-29, 231-32; *Langvardt & Langvardt*, *supra* note 5, at 240-42, 282, 288.

111. See *RAPPAPORT*, *supra* note 81, at 8, 12, 15; *Eldred*, 537 U.S. at 248-49 (Breyer, J., dissenting). In his *Eldred* dissent, Justice Breyer observed that the two percent of copyrighted works retaining commercial value after they reach fifty-five years of age produce approximately \$400 million per year in royalties. *Id.* See *RAPPAPORT*, *supra* note 81, at 8, 12, 15.

112. See *supra* text accompanying notes 81-88. As noted earlier, only two percent of copyrighted works have meaningful commercial value beyond the fifty-five-year point. See *supra* text accompanying note 82.

exceedingly valuable economic benefit¹¹³ could be conferred, for the most part, on a select circle of copyright owners, another duration extension should be seen as failing a cost-benefit test.¹¹⁴

But what about the other creators for whom Mr. Helprin professes concern: the creators who produced fine work but for whatever reason did not achieve financial success?¹¹⁵ Mr. Helprin would be pleased to let those creators' distant heirs collect licensing dollars if, by chance, someone wants to use their ancestors' work many years down the road.¹¹⁶ Why, however, should Congress do that? Our copyright and patent laws do not guarantee commercial success to creators of copyrighted works or inventors of patented items. Some will achieve success, but many will not. If we do not guarantee creators commercial success, there is no reason to distort our intellectual property laws by inserting provisions that throw a financial bone to creators' distant heirs. Put somewhat differently, why should we extend copyright duration in an effort to create a licensing market for works as to which little or no such market previously existed, especially when doing so would require Congress to ignore the public use rights contemplated by the Copyright Clause?

There are other duration extension-related costs besides the economic ones noted above. Another duration extension—again, take twenty years for illustrative purposes—would require members of the public to hunt down the current copyright owner to secure permission for a use that would have been freely available absent the extension.¹¹⁷ The costs in time and effort may be more significant to the would-be user than the licensing fee that would have to be paid if the copyright owner is located.¹¹⁸ Further, the importance of that “if” should not be underestimated. The very lengthy copyright duration we already have, not to mention the duration bonus Mr. Helprin advocates, leads in some instances to uncertainty over the current copyright owner's identity and

113. To the extent that a duration extension's economic benefit goes to the owner of a copyright on a work that had been created prior to the enactment of the extension, the economic benefit is a “windfall.” Posner, *supra* note 32, at 147; Crews, *supra* note 5, at 230.

114. See Posner, *supra* note 32, at 149; Langvardt & Langvardt, *supra* note 5, at 237 (each commenting on the CTEA's probable failure to pass a cost-benefit test). There are also non-economic costs associated with a duration extension. See *infra* text accompanying notes 117-120.

115. See Helprin, *supra* note 2.

116. See *id.*

117. See *Eldred*, 537 U.S. at 249-52 (Breyer, J., dissenting); *supra* text accompanying notes 32-33.

118. Crews, *supra* note 5, at 200-04. See Patry & Posner, *supra* note 54, at 1640-43; Langvardt & Langvardt, *supra* note 5, at 264; *Eldred*, 537 U.S. at 249-52 (Breyer, J., dissenting). Sometimes the copyright owner may be located after considerable effort, but the copyright owner is unwilling to grant a license. Crews, *supra* note 5, at 204.

contact information. This uncertainty may cause an exasperated would-be user to forego using a copyrighted work she wanted to use in her own creative endeavor out of fear that using the still-copyrighted work without permission could prompt the copyright owner to come out of the woodwork and sue for infringement.¹¹⁹ Accordingly, the would-be user's creative effort suffers, as does the creative process itself. Such a result is inconsistent with the Copyright Clause's objective of establishing a rich public domain of works from which the public can freely borrow.¹²⁰

One might expect copyright duration extension proponents such as Mr. Helprin to respond to the above criticisms by noting that the fair use defense sometimes protects uses of copyrighted works despite the lack of a license for the use.¹²¹ Duration extension advocates may also contend that, in any event, users are always free to borrow ideas and facts (as opposed to expression) from copyrighted works.¹²² Given the existence of the fair use defense and the idea-versus-expression distinction, why not lengthen copyright duration?

The unpredictability of the fair use defense serves as one reason not to extend duration. Answers to fair use questions come in varying shades of gray rather than black or white.¹²³ Fair use cases are highly fact-specific, making reliance on the defense a risky proposition for users of copyrighted works.¹²⁴ Whether a use is a "fair use" cannot reliably be determined until after expensive litigation, even if the defendant

119. See Crews, *supra* note 5, at 200-04; Posner, *supra* note 32, at 148; Patry & Posner, *supra* note 54, at 1642; *Eldred*, 537 U.S. at 249-52 (Breyer, J., dissenting). Cf. Lessig, *supra* note 45, at 59-60 (commenting on the frequent difficulty of determining whether a work is in the public domain).

120. See U.S. CONST. art. I, § 8, cl. 8; see also *supra* text accompanying notes 52-54.

121. See 17 U.S.C. § 107 (2000).

122. See *id.* § 102. In *Eldred*, the Court cited the fair use doctrine and the idea-versus-expression distinction as reasons why there was no need to subject the CTEA to a First Amendment analysis. See *Eldred*, 537 U.S. at 219-20.

123. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (noting that "bright-line rules" do not govern fair use analysis, which of necessity must be of the case-by-case variety); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 552 (1985) (noting that fair use analysis must be tailored to the facts and circumstances of the particular case).

124. See *Campbell*, 510 U.S. at 577; *Harper & Row*, 471 U.S. at 552. Although uses for purposes such as criticism or comment, news reporting, and teaching, scholarship, and research tend to be good candidates for fair use treatment, uses for such purposes clearly are not guaranteed to be fair use. See 17 U.S.C. § 107. In determining whether a use constitutes fair use, courts must consider all of the relevant facts and circumstances and must weigh and balance certain factors. See *id.*; see also *supra* note 11. A convincing argument might be made that if a user of a copyrighted work has made a good faith, but unsuccessful, effort to locate the copyright owner, fair use principles should be broadly applied by courts when the user is sued for infringement. See Patry & Posner, *supra* note 54, at 1643-58. There is no guarantee, however, that such an argument would prevail.

ultimately succeeds with a fair use argument.¹²⁵ Hence, the potential availability of the fair use defense would not sufficiently ameliorate the harm that another copyright duration extension would produce.

Neither would the idea-versus-expression distinction.¹²⁶ Telling a would-be user that she may borrow general ideas or facts from a copyrighted work means little if her creative activity would have been enhanced by the freedom to borrow expression. If the work would have been in the public domain absent the duration extension, the extension has deprived the would-be user of her right to borrow expression, regardless of whether the borrowing would have amounted to fair use.¹²⁷

C. What Uses Would a Duration Extension Restrict?

The above discussion leads logically to the third question listed earlier: what uses of public domain works would be curtailed by the Helprin proposal? Mr. Helprin chooses the most objectionable use—from his perspective and probably that of his readers—and stops there. He cites the example of the publishing company that takes the text of a public domain book, releases an edition of the book without adding any new material, and makes a great deal of money because of the skills and creative efforts of the long-deceased author.¹²⁸ A copyright duration extension would forestall what Mr. Helprin regards as mere money-grubbing.¹²⁹ Yet such an action by a publisher rests comfortably within the Article I, Section 8 public domain concept, despite the fact that the author's skills and efforts decades earlier made it all possible.¹³⁰ Such an action is no different from what happens upon the expiration of a patent. When a patent expires, competitors of the former patentee are free to profit from their production and sale of exactly the same invention.¹³¹

125. See 17 U.S.C. § 107. See also *Eldred*, 537 U.S. at 252-53 (Breyer, J., dissenting) (asserting that the potential availability of the fair use defense was not a good reason to sustain the CTEA against constitutional attack).

126. See 17 U.S.C. § 102 (2000). For a brief discussion of the idea-versus-expression distinction, see *supra* text accompanying notes 7-10.

127. Borrowing from a public domain work may be of any portion—or all—of the work and may be engaged in for any purpose. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 31, 33-34 (2003).

128. Helprin, *supra* note 2.

129. *Id.*

130. See U.S. CONST. art. I, § 8, cl. 8; see also *Dastar*, 539 U.S. at 31, 33-34.

131. See 35 U.S.C. §§ 154, 271 (2007) (patent owner entitled to exclude others from making, using, or selling patented invention or substantially similar version until patent expires). See also *id.* § 112 (patent applicant must provide specification setting forth details of invention, so that a person reasonably skilled in the field can reproduce invention upon expiration of patent); *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 29 (2001) (noting that “[i]n general, unless an intellectual property right such as a patent or copyright protects an item, it will be subject to copying”); *id.* at 25-26,

Actions of this sort are clearly contemplated by Article I, Section 8.¹³²

Other uses of public domain works differ from the later-edition-with-nothing-new use complained of by Mr. Helprin. To take examples dealing with novels or other books, there is the later edition that does include something new, such as a foreword or preface, a critical essay, or illustrations. Or there is a new version that modernizes the public domain version, offers an alternative ending to the story, or does something else to revitalize interest in the underlying public domain work. What about the historian whose book necessitates ready access to and use of public domain works? Then there is the moviemaker who plans to base a film on a public domain novel or story.¹³³ All of these uses and many similar ones involve the addition of considerable creative content over and above the original work and are thus consistent with the enhancement-of-creativity purpose underlying the Copyright Clause.¹³⁴ And every one of them would be curtailed or effectively eliminated, absent the permission of the duration-extended copyright's owner, if the Helprin proposal of successive duration extensions comes to fruition.

The Framers of the Constitution envisioned that, at some reasonable point, the copyright owner's control over the underlying work would end and the public's use rights would become paramount.¹³⁵ In arguing for continued delays in the arrival of that time, Mr. Helprin proposes a form-over-substance approach that may comply with the Copyright Clause's literal language¹³⁶ but would effectively negate a key component of the

29-30, 32, 34-35 (holding that trade dress principles cannot be used in an effort to impose liability on a copier of a functional feature of an item whose patent has expired). As noted earlier, *see supra* text accompanying note 99 (patents exist for twenty years from the filing of the patent application). 35 U.S.C. § 154(a)(2). For discussion of the much longer duration of copyrights, *see supra* text accompanying notes 18-32.

132. *See* U.S. CONST. art. I, § 8, cl. 8; *Dastar*, 539 U.S. at 31, 33-34; *TrafFix*, 532 U.S. at 29.

133. For discussion of such uses of public domain works, *see* Patry & Posner, *supra* note 54, at 1640-42. *See also* *Eldred v. Ashcroft*, 537 U.S. 186, 249-53, 266 (2003) (Breyer, J., dissenting). The example of a moviemaker's use of a public domain novel or story highlights the irony of Disney's influential role in lobbying for the CTEA, *see supra* note 32, and in its probable reprise of that role when upcoming calls for further extensions of copyright duration are issued. The irony lies in Disney's support of duration extensions that restrict the public domain, even though Disney has been a major beneficiary of the public domain in making its film versions of underlying works that are no longer protected by copyright. Langvardt & Langvardt, *supra* note 5, at 264 n.398. Having benefited from the public domain, Disney evidently sought to make sure that "nobody could do to Walt Disney what Walt Disney did to the Brothers Grimm." Lawrence Lessig, *Keynote Address at the Open Source Convention*, July 24, 2002, available at <http://www.oreillynet.com/pub/a/policy/2002/08/15/lessig.html>.

134. *See supra* text accompanying notes 49-54.

135. *See* Crews, *supra* note 5, at 230-32, 250.

136. *See Eldred*, 537 U.S. at 199-200, 208-10.

balance of rights called for in the clause.¹³⁷

IV. The Incentives Question

Clearly not enamored with the public domain concept contemplated in the Copyright Clause,¹³⁸ Mr. Helprin prefers to focus on the constitutional language empowering Congress to “promote the progress of science and the useful arts” by granting exclusive rights to creators.¹³⁹ As noted earlier, these rights presumably provide creators incentives to create.¹⁴⁰ Hence, copyright enactments by Congress must meet an “incentive test” in order to satisfy Article I, Section 8.¹⁴¹ Let us consider, then, the question of incentives in regard to the duration extension proposed by Mr. Helprin.

Answering the incentives question fully requires a look at both retrospective and prospective applications of the proposed duration extension. Retrospective application would mean that the extension would apply to copyrights on already created works, so long as the copyrights on those works had not already expired.¹⁴² Prospective application would mean that the extension would apply to copyrights on works created after the enactment of the duration extension.¹⁴³ Previous duration extensions enacted by Congress have applied both retrospectively and prospectively.¹⁴⁴ For instance, the CTEA applied retrospectively to unexpired copyrights on works created before the enactment’s 1998 effective date, as well as prospectively to copyrights on works created after the 1998 effective date.¹⁴⁵ Surely Mr. Helprin would favor, as would Disney et al., both retrospective and prospective

137. See *supra* text accompanying notes 52-66. The CTEA, though “held to be constitutional [in *Eldred*] . . . arguably functions in a most unconstitutional manner.” Crews, *supra* note 5, at 231. A similar observation could be made about the Helprin proposal if it would become law: perhaps constitutional under *Eldred*, but likely to function in a “most unconstitutional manner,” *id.*, when one considers the balance set up by the Copyright Clause. I say “perhaps constitutional” because, as previously noted, see *supra* text accompanying notes 71-75, congressional action to implement the Helprin proposal could be seen as an attempt to string together extensions—something that might affect the constitutional analysis. See *Eldred*, 537 U.S. at 199-200, 209-10 & n.16.

138. See Helprin, *supra* note 2.

139. U.S. CONST. art. I, § 8, cl. 8. See Helprin, *supra* note 2.

140. See *supra* text accompanying notes 50-51.

141. See Stadler, *supra* note 5, at 433-34.

142. See *Eldred*, 537 U.S. at 193, 198 (stressing that the petitioners’ constitutional challenge was restricted to the CTEA’s application to already created works).

143. See *id.* at 193 (noting that the petitioners in the case were not challenging the constitutionality of the CTEA’s application to works created after the effective date of the statute).

144. *Id.* at 194, 200-01, 204.

145. See CTEA, *supra* note 21; *Eldred*, 537 U.S. at 193.

applications of any further duration extensions that might be enacted.¹⁴⁶

Assume, then, that Congress is considering enacting a copyright duration extension as we approach January 1, 2019, when the current public domain freeze is scheduled to thaw and Disney's Steamboat Willie copyright will enter its last few years of existence absent a duration extension.¹⁴⁷ Such a proposed extension presumably would follow the model of the CTEA.¹⁴⁸ Also, assume that this hypothetical bill, which I will call the "Beat Goes On Act" (BGOA),¹⁴⁹ contemplates a twenty-year extension that would apply both retrospectively and prospectively.

For illustrative purposes, consider again Mr. Helprin's 1983 novel *Winter's Tale*.¹⁵⁰ If enacted, the BGOA would extend the duration of the copyright on *Winter's Tale*, an already created and still-copyrighted work as of the time of the enactment of the duration extension.¹⁵¹ In this example, would the proposed BGOA have furnished Mr. Helprin an incentive to write *Winter's Tale*? Of course not, given the obvious fact that he wrote the novel many years before the making of the duration

146. Without retrospective application, their preexisting works would not be covered by the extension. Retrospective application of the CTEA was of considerable benefit to Disney, *see supra* text accompanying notes 25-33, so Disney et al. logically would favor retrospective application of any future extensions. Nothing in Mr. Helprin's op-ed suggests that he favors only prospective—as opposed to prospective and retrospective—application of the further extension he advocates. *See* Helprin, *supra* note 2.

147. For an explanation of the public domain freeze brought about by the CTEA, *see supra* note 58 and accompanying text. The Steamboat Willie copyright's duration saga is chronicled at *supra* text accompanying notes 25-34.

148. CTEA, *supra* note 21.

149. The title of the hypothetical proposed enactment alludes to *The Beat Goes On*, a song written by Sonny Bono and registered with the U.S. Copyright Office in 1966. SALVATORE (SONNY) BONO, *THE BEAT GOES ON* (1966); Salvatore (Sonny) Bono, *The Beat Goes On*, U.S. Copyright Regis. No. RE-680-278 (renewal registration, Jan. 24, 1994) (original registration no. EU972894, Dec. 30, 1966). The famous singing duo Sonny & Cher made a hit recording of *The Beat Goes On*. SONNY & CHER, *THE BEAT GOES ON* (Atlantic Records 1967). *See* *The Beat Goes On & On & On & On*, http://www.epinions.com/content_3427442820 (last visited July 24, 2007). It seems fitting to use the "Beat Goes On Act" title for the hypothetical duration extension proposal discussed in the text, not only because of the reference to Bono in the CTEA's title but also because Bono advocated lengthy duration extensions when he learned that the proposal he really favored—perpetual copyright duration—would be unconstitutional. *See supra* note 63. As noted earlier, Bono's widow, Mary Bono, expressed essentially the same preferences regarding copyright duration in her role as Bono's successor in the House of Representatives. She also spoke favorably of the "forever, less one day" approach to copyright duration. *See id.* and accompanying text.

150. HELPRIN, *supra* note 18.

151. By virtue of the CTEA's life-plus-seventy-years rule, *see* 17 U.S.C. § 302(a) (2000), and Mr. Helprin's very much alive status, *see supra* note 19, the copyright on *Winter's Tale* would still be relatively young when Congress enacts the hypothetical BGOA.

extension proposal.¹⁵² What about Disney and the Steamboat Willie copyright? Again, the BGOA would apply to the copyright even though the BGOA could not have provided an incentive for the creation of the underlying 1928 cartoon.¹⁵³ Viewed through the lens of Article I, Section 8 and its incentive test,¹⁵⁴ the impossibility of furnishing incentives to create already created works would leave the retrospective application of the BGOA as simply a huge bonus to owners of copyrights on preexisting but still copyrighted works.¹⁵⁵ As demonstrated earlier, this bonus would come at significant cost to the public and in derogation of the public's use rights in the copyright bargain envisioned by Article I, Section 8.¹⁵⁶

A prospective application of the hypothetical BGOA would seem at first glance to fare better under the incentive test. In theory, a duration

152. The same was true of the CTEA, whose 1998 duration extension applied to the copyright on the already created *Winter's Tale*. See *supra* text accompanying note 23.

153. Similarly, the CTEA and a mid-1970s duration extension applied to the Steamboat Willie copyright despite the impossibility of those enactments furnishing any incentive to create the 1928 cartoon. See *supra* text accompanying notes 25-34.

154. See Stadler, *supra* note 5, at 433-34. See *Eldred v. Ashcroft*, 537 U.S. 186, 212-13, 222 (2003); *id.* at 224-25, 226-27 (Stevens, J., dissenting); *id.* at 254-57 (Breyer, J., dissenting). Of course, the *Eldred* majority and the dissenters disagreed over whether the CTEA violated Article I, § 8, see *supra* text accompanying notes 69-70, but there was no disagreement over whether the Framers envisioned copyright laws as a way by which Congress could stimulate the creation of new works.

155. The dissenters in *Eldred* expressed the same concern about the CTEA. See *Eldred*, 537 U.S. at 226-27, 234-38, 240-41 (Stevens, J., dissenting); *id.* at 248-52, 257, 266 (Breyer, J., dissenting). Faced with the troubling reality that the CTEA could not have furnished any incentive to create works that had already been created, the *Eldred* majority finessed the incentives issue. It did so by holding that, instead of subjecting each individual copyright enactment by Congress to a provision-of-incentives inquiry, the relevant test for purposes of the Copyright Clause should be whether the overall system of copyright protection enacted by Congress would generally tend to promote creative activity. See *id.* at 212-13, 222. Under this focus on the system, the CTEA passed the test because, of course, the overall legislative scheme of rights in the copyright realm would tend to enhance creativity. See *id.* The system focus can be criticized on the basis that it makes the test too easy for the government to pass, because the overall scheme's undisputed tendency to enhance creativity will effectively insulate from constitutional scrutiny the individual enactments within that scheme even if some of those enactments simply give a bonus to owners of copyrights on already created works. See Langvardt & Langvardt, *supra* note 5, at 264-65. But *Eldred* is the law. The lack-of-incentives/granting-of-a-bonus argument, therefore, is not one that can be used successfully to attack a retrospectively applied duration extension as *unconstitutional*. However, such an argument should still have resonance when it is used—as it is here—as a reason why a further duration extension would be *unwise* public policy and should not be enacted by Congress. Even the *Eldred* majority, after all, had serious concerns about the wisdom of the CTEA. See *Eldred*, 537 U.S. at 208, 222.

156. See *supra* text accompanying notes 81-127. See also Stadler, *supra* note 5, at 436, 440, 456-69 (exploring copyright owners' continuing advocacy of ever-greater rights and congressional tendency to respond with grants of such rights, with the effect of restricting the public's entitlement to use underlying works).

extension's promise of a longer period of copyright protection could furnish a would-be creator an incentive to create a work he might not otherwise have created. Given the already very lengthy duration of copyright protection, however, it seems far more likely that an enactment such as the proposed BGOA would furnish no incentive beyond what was already present, or at most would offer only a very small marginal incentive.¹⁵⁷ Take the hypothetical alluded to by Mr. Helprin, and assume that he is pondering whether to write the Great American Novel.¹⁵⁸ If he writes the Great American Novel under the current set of duration rules, he can expect that the copyright will run for the remainder of his life plus seventy years.¹⁵⁹ Although Mr. Helprin tries unsuccessfully to make the case for allowing his heirs to benefit from his creative efforts for more than seventy years after he passes on,¹⁶⁰ the real significance of Mr. Helprin's Great American Novel example lies in its usefulness for purposes of the incentive test. If Mr. Helprin is seriously considering writing the Great American Novel, one can be confident that his thought process will not proceed along the following hypothetical lines:

If I write the Great American Novel, the copyright will only last for the rest of my life plus seventy years. That is not enough to convince me I should write. It is not worth the trouble under a life-plus-seventy setup. But if Congress were to make copyright duration longer and guarantee, say, life-plus-ninety in terms of rights, I would see the situation differently. In that event, I would write the Great American Novel.

157. See Stadler, *supra* note 5, at 465-66; Langvardt & Langvardt, *supra* note 5, at 248-51; Posner, *supra* note 32, at 151 (all making lack-of-meaningful-additional-incentive observations in regard to the CTEA and its prospective application). See also *Eldred*, 537 U.S. at 254-5, 265-66 (Breyer, J., dissenting) (arguing that any marginal incentive furnished to creators by the CTEA's prospective application would be exceedingly small and should be seen as insufficient to support duration extension). In *Eldred*, only Justice Breyer's dissent addressed the incentives question in regard to the CTEA's prospective application. See *id.* The *Eldred* majority avoided engaging in such a discussion by pointing out that, in their appeal to the Supreme Court, Eldred and the other petitioners had chosen to direct their constitutional attack only against the CTEA's retrospective application. *Id.* at 193, 198, 221-22. In the lower courts, the constitutional challenge had been directed toward the prospective application as well as the retrospective application. See *Eldred v. Reno*, 239 F.3d 372, 373-74 (D.C. Cir. 2001), *aff'd sub nom.* *Eldred v. Ashcroft*, 537 U.S. 186 (2003). Presumably, however, a Supreme Court inclined to hold the CTEA constitutional in its retrospective application would say the same thing about its prospective application. Even so, the argument that the hypothetical BGOA would provide essentially no added incentive in its prospective application should help support the view that such an enactment would be unwise—even if constitutional—and should therefore be avoided by Congress.

158. Helprin, *supra* note 2.

159. 17 U.S.C. § 302(a) (2000).

160. See Helprin, *supra* note 2.

I hope Mr. Helprin writes the Great American Novel. Whether he writes it, however, almost certainly will not depend upon whether the duration of the copyright will be measured under the present life-plus-seventy rule or under some later duration extension Congress might unwisely enact. A life-plus-ninety regime would furnish him (and similarly situated would-be creators) either no creative incentive beyond the incentive already provided by the life-plus-seventy rule, or a marginal incentive so tiny that it should not be seen as sufficient enough to justify the significant rights-postponing and cost-inducing effects a further duration extension would have in regard to the public.¹⁶¹

In addition, notwithstanding the familiar Samuel Johnson remark that only a “blockhead” would write for reasons other than money,¹⁶² writers and other creators are prompted to engage in creative work by considerations other than copyright protections. To take a nonexclusive list, creators may be motivated by expressive impulses, notions of self-fulfillment, and desires to enlighten and entertain others.¹⁶³ Copyrights are important, but given the very lengthy duration they already have and other creative motivations of the sort just noted, we do not need yet another copyright duration extension to encourage creative output. Such output will be there in ample supply, and potentially in even greater supply,¹⁶⁴ if Congress resists the call to make copyrights last longer than they already do.

One further incentive-related question merits consideration. Would another copyright duration extension furnish the heirs of a long-deceased creator any significant incentive to engage in creative activity? In general, such heirs would seem to have the same incentives to create which any scheme of copyright protection provides to any would-be creators—no more, no less. One might argue, however, that further extensions of copyright could even furnish a disincentive to heirs of long-deceased creators to engage in their own creative activity. Why should a distant heir create a new work himself when he can continue to collect royalties and licensing fees for even more years on the basis of great-great-grandma’s creative efforts way back when?¹⁶⁵ This argument

161. See *supra* note 157.

162. JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON*, vol. vi, chap. iii (1776).

163. See Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1946-47 (2006); Posner, *supra* note 44, at 180.

164. If the flow of works into the public domain resumes and is allowed to continue, creative output should increase as public domain works furnish the basis of new creative activity. See *supra* text accompanying notes 52-66.

165. The “great-great-grandma” example is not a stretch. Even without the duration extension proposed by Mr. Helprin, the life-plus-seventy-years rule that applies to copyrighted works created in 1978 or later, 17 U.S.C. § 302(a), will lead with

sounds harsh but highlights the probability that lengthening copyright duration will do nothing to enhance creativity.

It is understandable why a gifted writer such as Mr. Helprin, chafing at the idea that others will eventually have unrestricted ability to use and reproduce his copyrighted works, would like to see his heirs benefit from his creations for a longer period of time. I have less sympathy for copyright owners in the same sort of position in which Disney finds itself regarding the Steamboat Willie copyright,¹⁶⁶ though I acknowledge the economic considerations that prompt Disney and other similarly situated copyright owners to favor ever-lengthening copyright duration.¹⁶⁷ Article I, Section 8 commands, however, that copyright protection on any given work must end at some reasonable point, so that the public may freely use the work.¹⁶⁸ In the balance drawn by the Copyright Clause, such use by the public is just as important a way of enhancing creativity as is a copyright system that grants rights to creators.¹⁶⁹

V. Suggestions to Congress

Mr. Helprin proposes what amounts to a “forever, less one day” approach in which Congress continues to extend copyright duration without making it expressly perpetual.¹⁷⁰ This gimmick, to which Disney and other corporate copyright owners would surely subscribe if they thought it would pass muster, would make a mockery of the Copyright Clause’s “limited times” language and would decimate the public’s use rights contemplated by the Framers.¹⁷¹ As noted earlier, Mr. Helprin has already received one twenty-year duration bonus in regard to the

considerable frequency to copyrights that last far longer than 100 years. *See supra* text accompanying notes 18-23.

166. Recall that, concerning the Steamboat Willie copyright, Disney has already qualified for two lengthy duration extensions. By virtue of those extensions, Disney has been guaranteed ninety-five-years of protection even though, under the law existing when Steamboat Willie came into existence and for decades afterward, Disney’s rights were to have ended—and the public’s were to have begun—at the fifty-six-year mark. *See supra* text accompanying notes 25-34. Why should Disney and similarly situated copyright owners be allowed to hit the jackpot a third time?

167. As Professor Stadler has noted, the granting of greater rights to copyright owners has led to a circle of expectations in which copyright owners, having received expanded rights, then want more (and ever-expanding) rights in order to maximize control over their underlying works. Stadler, *supra* note 5, at 435-38.

168. *See* U.S. CONST. art. I, § 8. *See also* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 33-34 (2003) (stressing the importance of the public’s rights to make unrestricted use of formerly copyrighted works once the copyrights expire).

169. *See* U.S. CONST. art. I, § 8; *supra* text accompanying notes 49-66.

170. *See* Helprin, *supra* note 2; *supra* text accompanying notes 62-64; *supra* note 63.

171. *See* U.S. CONST. art. I, § 8; *supra* text accompanying notes 52-54, 65-66, 106-120, 128-137.

copyright on *Winter's Tale*.¹⁷² Disney has fared even better regarding the Steamboat Willie copyright and other nearly-as-old copyrights.¹⁷³ Enough is enough.

Congress should spurn calls for further extensions of copyright duration. In doing so, Congress must resist the temptation to focus only on the actual holding in *Eldred v. Ashcroft*,¹⁷⁴ in which the Supreme Court sustained the CTEA against a constitutional challenge and appeared to signal broad congressional latitude to extend copyright duration without violating the Copyright Clause.¹⁷⁵ Although *Eldred* established this constitutional latitude,¹⁷⁶ Congress should not further exercise it.

Congress should read between the lines of *Eldred* and consider the messages the decision sent apart from its actual holding. The Court, for example, hinted that the constitutional analysis might have been different if it had appeared that Congress was trying to circumvent the Copyright Clause's "limited times" language by stringing together successive extensions.¹⁷⁷ This hint should make Congress wary of future extensions and the potential they might create for an appearance that extensions were being strung together as a convenient way of getting around the "limited times" constraint.¹⁷⁸

There is another critical message for Congress to heed: the clear indication in *Eldred* that even though the CTEA was constitutional, it was poor public policy. As to this message, the Court was unanimous.¹⁷⁹ When Congress thinks about *Eldred*, it should focus more on this unanimous message than on the 7-2 holding that the unwise CTEA was constitutional.¹⁸⁰ *Eldred* seems to reflect a majority that did not want to

172. See *supra* text accompanying notes 18-24. The twenty-year bonus stemmed from the CTEA, which substituted a life-plus-seventy-year duration rule for the life-plus-fifty-year rule that existed when Mr. Helprin wrote his novel. See *id.*; 17 U.S.C. § 302(a).

173. See *supra* text accompanying notes 25-33; *supra* note 166. See also *supra* notes 28-30 (duration provisions in 1909 Act, 1976 Act, and 1998 CTEA).

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

175. *Id.* at 199-200, 204-05, 208, 212-13, 216-19, 221-22.

176. It can be argued that the Court erred in this regard. See, e.g., Langvardt & Langvardt, *supra* note 5, at 236-70. Nevertheless, the Court provided Congress with plenty to consider. See *infra* text accompanying notes 177-82.

177. *Eldred*, 537 U.S. at 199-200, 209, 209-10 & n.16.

178. See *id.* Justice Breyer suggested in his dissent that Congress may have been engaging in such action when it enacted the CTEA. See *id.* at 255-56 (Breyer, J., dissenting). Might other Justices decide to take such a position regarding future extensions, if Congress enacts them? Cover for such a position could be provided by the *Eldred* majority's hint, as identified in the text to which this note is appended.

179. *Id.* at 208, 222 (Ginsburg, J., majority opinion subscribed to by seven Justices); *id.* at 223-37 (Stevens, J., dissenting); *id.* at 243-66 (Breyer, J., dissenting).

180. *Id.* at 222.

strike down the CTEA because of concern over the consequences that might ensue, but also had little enthusiasm for the prospect that Congress might again extend copyright duration.¹⁸¹ Hence, the Court sent Congress the hints discussed above—hints that Congress should not ignore.¹⁸²

Duration extension proponents will no doubt trot out the big names in support of their proposals. When it enacted the CTEA, Congress not only did the bidding of major corporations such as Disney,¹⁸³ but also let itself be influenced by stars such as Bob Dylan, Don Henley, Quincy Jones, and Carlos Santana.¹⁸⁴ The stars' testimony in support of duration extension bills appeared to carry significant weight with Congress at the time the CTEA was enacted.¹⁸⁵ This was so even though their remarks related more to the importance of copyright protection generally (and who disagrees with that?) than to any added creative incentive furnished by a duration extension.¹⁸⁶ If other big names join Mr. Helprin, will Congress respond affirmatively to the call for yet another duration extension? Not if Congress maintains the post-*Eldred* sense of embarrassment it should have. That, however, may be a big "if."¹⁸⁷

VI. Conclusion

The CTEA was an ill-considered idea. Its twenty-year freeze of the public domain amounted to poor public policy, as the Supreme Court signaled in *Eldred* even though it upheld the statute against constitutional

181. See Langvardt & Langvardt, *supra* note 5, at 218, 234, 257-59; Posner, *supra* note 32, at 151-52, 154-55. See also *supra* note 71 (discussing the Court's reluctance to declare the CTEA unconstitutional).

182. At the same time, Congress should give serious thought to mitigating the harm done to the public domain by its previous duration extensions, see *supra* text accompanying notes 25-34, 56-59, and by the other blows it has struck at the public domain, see *supra* note 56. A sensible way to do so would be to institute a requirement that copyright owners pay a very nominal fee at designated intervals as a condition of maintaining the full copyright duration now contemplated by the Copyright Act. See Lawrence Lessig, *Protecting Mickey Mouse at Art's Expense*, N.Y. TIMES, Jan. 18, 2003, at A17. Further discussion of the merits of such a requirement is beyond the scope of this Article. See *id.* (for a discussion). Langvardt & Langvardt, *supra* note 5, at 270-72; Marshall Leaffer, *Life After Eldred: The Supreme Court and the Future of Copyright*, 30 WM. MITCHELL L. REV. 1597, 1603-04 (2004); Schwartz & Treanor, *supra* note 69, at 2410.

183. See *supra* text accompanying notes 25-33.

184. Langvardt & Langvardt, *supra* note 5, at 238-39, nn. 280-82.

185. See *Eldred v. Ashcroft*, 537 U.S. 186, 207-08 n.15 (2003).

186. See Langvardt & Langvardt, *supra* note 5, at 238-39, nn. 280-82; *Eldred*, 537 U.S. at 255 (Breyer, J., dissenting).

187. Acknowledging that his view of the future may not be widely shared, one commentator has predicted that Congress will not continue to extend copyright duration. See Leaffer, *supra* note 182, at 1603. I hope he is a good prognosticator, but all bets are off.

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attack. The error of the CTEA should not be repeated when high-profile copyright owners, such as Mark Helprin, ask for further extensions of copyright duration. If Congress again does the bidding of the duration extension proponents and implements the successive extensions charade described earlier, even the Court that strained in *Eldred* to label the CTEA constitutional, though unwise, could take a less deferential view of congressional actions under Article I, Section 8 of the Constitution.

We are stuck with the CTEA, of course, but further extensions are not inevitable if Congress considers the full range of interests contemplated by Article I, Section 8. Congress should now pay long-overdue attention to the public's rights in the grand copyright bargain by resisting current and future calls to have the copyright duration extension beat go on and on and on.