



## Building a Better Mousetrap: Blocking Disney's Imperial Copyright Strategies

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### ABSTRACT

Disney is one of the most powerful media corporations in the world, long dominant in the area of animation. It has successfully transferred this dominance in animated films into dominance in live theater, with hit productions including *Beauty and the Beast*, *Aladdin*, *The Little Mermaid*, and *Frozen*. It has also begun to convert its well-known animated properties into live-action films, including *Beauty and the Beast*, *Aladdin*, and *The Lion King*.

As a major media corporation, Disney has proven itself to be fiercely protective of its copyright. Twenty years ago, it famously lobbied hard for an extension of the copyright term to increase protection of valuable properties as basic as Mickey Mouse and Winnie the Pooh. It has issued millions of takedown notices under the Digital Millennium Copyright Act. It has brought litigation against Redbox so aggressive that a judge found it to be a rare example of copyright misuse.

However, while copyright misuse may be a rare legal ruling, Disney arguably misuses it frequently. Disney's properties are frequently built on public domain works, borrowing from myths, legends, folk stories, fairy tales, and other narratives that are free for the taking. However, once Disney

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builds a movie around these pieces of common intellectual property, it then tries to use copyright law to deprive other people of access to these public domain properties.

This Article examines the importance of the public domain as a balance to the copyright monopoly, including Disney's use of public domain properties to build its media empire. The Article then discusses the tactics by which Disney expands its copyright to conquer others' use of the public domain, through favorable legislation, aggressive litigation, and strategic trademarking. The Article concludes that Disney's plundering of the public domain represents the phenomenon of "re-copyrighting" that distorts the delicate copyright balance and limits future non-Disney-sponsored creativity. The Article argues that we are in the midst of a sea change in how people perceive the baseline of ownership of creativity and the importance of the public domain, and that society should fight to retain the bulwark of the public domain against encroaching ownership.

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## I. INTRODUCTION

It's a tale as old as time.

*Beauty and the Beast*, that is. Versions of the story can be traced back some four thousand years.<sup>1</sup>

Nowadays, though, if you mention *Beauty and the Beast*, chances are people think of a bright yellow gown swirling around a ballroom, a French candelabra and a British clock, and a preening villain called Gaston. That, after all, is what categorized the blockbuster 1991 movie<sup>2</sup> (the first animated feature ever nominated for a Best Movie Oscar<sup>3</sup>), as well as its attendant stage musical version<sup>4</sup> and its subsequent live-action adaptation<sup>5</sup> (in which the famous yellow gown was the object of fevered fixation<sup>6</sup>).

This article argues that Disney's actions in taking the public domain folk tale of *Beauty and the Beast* and adding its own embellishments effectively "re-copyrighted" a work that had been in the public domain. Disney cannot own the basic structure of *Beauty and the Beast* – that belongs to all of us – but Disney does own everything it added, and the more that its additions come to define the original folk tale, the more Disney is able to assert ownership over the folk tale itself.

Disney's actions in this respect are merely one example of how Disney's conquering copyrights strip the public domain and deprive the culture of access to creative works, in turn stifling non-Disney-endorsed creativity. This article examines the importance of the public domain as a balance to the copyright monopoly. The article then discusses the tactics by which Disney plunders the public domain and then uses its resulting copyrights to block others' use of the public domain. The article concludes that Disney's behavior represents the phenomenon of "re-copyrighting" that distorts the

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<sup>1</sup> See *Fairy Tale Origins Thousands of Years Old, Researchers Say*, BBC (Jan. 20, 2016), <https://www.bbc.com/news/uk-35358487> [<https://perma.cc/SS7Z-Q7PS>].

<sup>2</sup> See *BEAUTY AND THE BEAST* (Walt Disney Pictures 1991).

<sup>3</sup> See *Experience over Eight Decades of the Oscars from 1927 to 2020: The 64th Academy Awards — 1992*, ACAD. MOTION PICTURE ARTS & SCI., <https://www.oscars.org/oscars/ceremonies/1992> [<https://perma.cc/47L5-CT3P>] (last visited Feb. 20, 2020).

<sup>4</sup> See *Beauty and the Beast*, PLAYBILL, <http://www.playbill.com/production/beauty-and-the-beast-palace-theatre-vault-0000009145> [<https://perma.cc/C4UG-AUCW>] (last visited Feb. 20, 2020).

<sup>5</sup> See *Beauty and the Beast* (2017), IMDB, <https://www.imdb.com/title/tt2771200/> [<https://perma.cc/5FPN-4HVZ>] (last visited June 20, 2019).

<sup>6</sup> See, e.g., Genevieve Valentine, *Belle's Costumes Don't Fit the Live-Action Beauty and the Beast, but They Fit Her Brand*, Vox (Mar. 28, 2017), <https://www.vox.com/culture/2017/3/28/15071766/beauty-and-the-beast-belle-yellow-gold-dress-costumes> [<https://perma.cc/SAW3-ECLA>].

delicate copyright balance and limits future non-Disney-sponsored creativity. The article argues that society should fight to retain the bulwark of the public domain against encroaching ownership.

## II. THE VALUE OF THE PUBLIC DOMAIN

### A. *Copyright's Creation of the Public Domain*

Copyright is much younger than creativity. After all, humans have been creating from the time of paintings in caves.<sup>7</sup> The idea of a legal protection providing ownership over that creativity lagged behind, however, and was a concept mainly driven by the invention of the printing press.<sup>8</sup>

Before the printing press came along in 1476, creativity was expensive to reproduce: “copying was so impractical as to be impossible.”<sup>9</sup> Generally, reproduction happened by hand, transcribed by monks in monasteries.<sup>10</sup> The process was painstaking and laborious.<sup>11</sup> Even acquiring a book from which to make the copy was likely a difficult and time-consuming endeavor.<sup>12</sup> For this reason, most people rarely saw books or received exposure to written creativity.<sup>13</sup> In fact, prior to the printing press, the total number of books in all of Europe was estimated to be less than 15,000.<sup>14</sup>

The printing press’s invention radically changed that culture. Whereas once knowledge was painstakingly copied by hand through a lengthy process, the printing press allowed works to be duplicated mechanically and

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<sup>7</sup> A recent paper dates the earliest cave paintings as occurring 64,000 years ago. See D. L. Hoffmann et al., *U-Th Dating of Carbonate Crusts Reveals Neandertal Origin of Iberian Cave Art*, 359 *Sci.* 912, 912–15 (2018).

<sup>8</sup> See 1 Patry on Copyright § 1:5 (“The printing press . . . is frequently cited as the *raison d’être* for copyright.”); Edward Lee, *Freedom of the Press 2.0*, 42 *Ga. L. Rev.* 309, 328 (2008) (“It is well recognized that copyright originally developed in reaction to the advent of the printing press, which multiplied exponentially the number of copies of a work that could be made.”); Robert L. Shaver, *Copyright Law in the Digital Age*, 49 *ADVOCATE* 17 (2006).

<sup>9</sup> Shaver, *supra* note 8.

<sup>10</sup> See Peter K. Yu, *Of Monks, Medieval Scribes, and Middlemen*, 2006 *MICH. ST. L. REV.* 1, 3 (2006).

<sup>11</sup> See *id.* at 7–8.

<sup>12</sup> See *id.* at 8.

<sup>13</sup> See *id.* (“Any book, even badly produced and riddled with errors, might well be the only one on that subject that anyone in the community had ever seen.”) (quoting MARC DROGIN, *ANATHEMA!: MEDIEVAL SCRIBES AND THE HISTORY OF BOOK CURSES* 1, 6 (1983)).

<sup>14</sup> See Ira Glasser, *The Struggle for A New Paradigm: Protecting Free Speech and Privacy in the Virtual World of Cyberspace*, 23 *NOVA L. REV.* 627, 629 (1999).

much more quickly.<sup>15</sup> Its arrival in England immediately triggered a long, protracted struggle over what to do with this unprecedented ability to duplicate. The first knee-jerk reaction was one familiar to twenty-first century consumers who lived through the digital revolution: an attempt to put the technological cat back in the bag through strict regulation of the availability of the printing press.<sup>16</sup>

Throughout the sixteenth and seventeenth centuries, printing presses were strictly controlled by a series of powerful entities: the Church, Parliament, and the Crown.<sup>17</sup> The results were an undesirable amount of censorship and the increasing monopoly of a few printing presses, who possessed all the rights, even over the authors of the materials in question.<sup>18</sup> In arguing against this stranglehold over the dissemination of creative works, people seized upon the idea that the creators were being deprived of their property in their lack of agency.<sup>19</sup>

The solution was to put the power in the hands of the creators, by creating a copyright: “the Sole Liberty of Printing and Reprinting,”<sup>20</sup> established by the Statute of Anne in England in 1710.<sup>21</sup> In the beginning, this right was exactly as its name suggested: it conferred upon the holder the right to *copy* the creative work in question, no more, no less. As it arose in response to improved publication abilities, it was effectively a publication right.

Copyright still functioned as a type of government-approved censorship, in that it granted a monopoly over the production of certain pieces of creativity and prohibited others from sharing that creativity. However, it shifted the power of this censorship away from the government-approved publishers into the hands of the authors themselves.<sup>22</sup> It therefore intro-

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<sup>15</sup> See Lee, *supra* note 8, at 316 (calling the printing press “the only technological means of mass publication then in existence”); see also Patry, *supra* note 8; Nicholas G. Karambelas, *Where the First Amendment Comes from*, MD. B.J., July/August 2017, at 4, 7.

<sup>16</sup> See Lee, *supra* note 8, at 312; see also Transcript of Oral Argument at 11, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005) (No. 04-480) (“[F]or all I know, the monks had a fit when Gutenberg made his press.”).

<sup>17</sup> See Karambelas, *supra* note 15, at 4, 8.

<sup>18</sup> See Lee, *supra* note 8, at 323; Patry, *supra* note 8.

<sup>19</sup> See Lee, *supra* note 8, at 324 (quoting a person accused of running an unauthorized printing press as arguing that the regulations “directly intrench on the hereditary liberty of the subject’s persons and goods”) (citing FREDERICK SEATON SIEBERT, *Freedom of the Press in England 1476-1776*, at 140 (1952)).

<sup>20</sup> Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

<sup>21</sup> See *id.*

<sup>22</sup> See Lee, *supra* note 8, at 326-27.

duced the idea not as one of censorship, but one of *ownership* over one's own creative fruits – a right that was foreign to the initial concept of creativity.<sup>23</sup> Whereas before the system was completely disconnected from the creative origin, copyright rooted itself in the idea of authorship conferring particular advantages.<sup>24</sup> It still involved control of creativity, but shifted whose hands were in control.

These days, most of the works we consume enjoy copyright protection, many of them for the entirety of our lifetimes. In the beginning, though, copyrighted works were the exception. The public domain was vast, containing all of the creativity that was produced prior to 1710, including many works that form the bulwark of the western canon of great books, such as *The Odyssey*, *The Iliad*, *The Aeneid*, and *The Inferno*.<sup>25</sup> The term of protection was a brief fourteen years, with one renewal allowed.<sup>26</sup> Life expectancy at the time was much lower than today but was still around thirty years for men,<sup>27</sup> meaning that the copyright term was only around half of a lifetime. This meant that, although censorship might block your access to a work initially, that work would enter the public domain relatively quickly, with the chances good that it would happen in your lifetime. Given that publication, while easier than it had been, was still much more difficult than the instantaneous copying all of us have at our fingerprints today, the half-life of a work of creativity was doubtless much longer than it is today, when new works are produced with dizzying speed.<sup>28</sup> At the beginning, the public

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<sup>23</sup> Patry, *supra* note 8 (“[T]he [royal] grant of [printing privileges] was by no means a ‘right’ in the modern sense of the term. The idea of anyone having a right . . . was completely unfamiliar in the early English . . . practice. The . . . grant was a tool for dispensing royal policy, and it was based on royal discretion. . . . [E]ach grant was an independent decision dependent on the exercise of specific discretion.”) (quoting Oren Bracha, *Owning Ideas: The History of Anglo-American Intellectual Property Law*, Chapter 1 (SJD dissertation, Harvard University 2005)).

<sup>24</sup> See Lee, *supra* note 8, at 327. It also, however, established a system where this new right was divested by the author over to the publisher for a single lump sum; copyright transfer is rooted deep in history. See Patry, *supra* note 8.

<sup>25</sup> See, e.g., Robert Spoo, *Ezra Pound's Copyright Statute: Perpetual Rights and the Problem of Heirs*, 56 *UCLA L. Rev.* 1775, 1812 (2009) (noting that these works preceded the idea of copyright). The public domain also included (and includes) every frivolous and forgotten work as well, of course, but these tend not to loom as large in our imaginations.

<sup>26</sup> See Statute of Anne, *supra* note 20.

<sup>27</sup> See KENNETH POMERANZ, *The Great Divergence: China, Europe, and the Making of the Modern World Economy* 37 (2000).

<sup>28</sup> For example, a 2018 article explored the amount of data we produce each day and stated that in the two years prior to 2018, 90 percent of the data available in the whole world was created. Bernard Marr, *How Much Data Do We Create Every*

domain stalled for fourteen years as copyright terms fell into place, but then the public domain began expanding again, so that the effect of the initial creative ownership was relatively limited.

The Statute of Anne did not just create copyright; it simultaneously created the idea of the public domain.<sup>29</sup> By establishing the baseline that copyright was limited in duration and would expire automatically, the Statute of Anne was careful not just to provide some protections to copyright holders but also to provide some protections to the public in the form of an ongoing store of public domain works to which all had free access. In recognition of the tremendous censorship power of the copyright monopoly, the Statute of Anne made sure to limit its scope.<sup>30</sup>

### B. *The Shrinking of the Public Domain*

The concept of the public domain, inherent at the birth of copyright in 1709, continued when the United States passed its first Copyright Act in 1789.<sup>31</sup> Taking its cue from the Statute of Anne a full eighty years earlier, the initial copyright ownership term automatically expired after fourteen years, unless it was renewed.<sup>32</sup> This system of renewal persisted nearly two centuries, with data showing an astonishingly small rate of renewal for most

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*Day? The Mind-Blowing Stats Everyone Should Read*, FORBES (May 21, 2018, 12:42 AM), <https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/> [<https://perma.cc/7M7N-P29S>].

<sup>29</sup> Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 BERKELEY TECH. L. J. 1427, 1437 (2010) (“The [Statute of Anne’s] time limitations were seen as the standard means for blunting the pernicious effects of monopolies since the early seventeenth century. It was also a mechanism crucial to the Statute’s ‘encouragement of learning’ purpose by effectively creating what is known today as the public domain.”).

<sup>30</sup> See Lee, *supra* note 8, at 326-27.

<sup>31</sup> Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 425-27 (2004) (stating that “[t]he Act, like the Copyright Clause and the Statute of Anne before it, emphasized the public benefit rationale for copyright protection” and noting that prominent figures like James Madison and Thomas Jefferson emphasized the *limited* monopoly that copyright grants for the *public* benefit).

<sup>32</sup> Jennifer Jenkins, *In Ambiguous Battle: The Promise (and Patbos) of Public Domain Day*, 2014, 12 DUKE L. & TECH. REV. 1, 4 (2013); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 543 (2004); Farhad Manjoo, *The Mouse Who Would Be King*, SALON (Apr. 8, 2004), [https://www.salon.com/2004/04/08/copyright\\_culture/](https://www.salon.com/2004/04/08/copyright_culture/) [<https://perma.cc/HD4Z-PTJU>]; *The Incredible Shrinking Pubic Domain*, *supra* note 29.



forms of creativity.<sup>33</sup> This means that, as recently as fifty years ago, the vast majority of copyrighted works fell into collaborative ownership of the public domain roughly thirty years after their creation, at the expiration of the first twenty-eight-year term of protection that was then in effect.<sup>34</sup> This meant that, only a few generations earlier, it was expected that the works you grew up with would enter the public domain as you were entering your late middle age.<sup>35</sup>

The 1976 Copyright Act shifted that expectation. Now, copyright would last for life – and for many decades beyond that as well.<sup>36</sup> The copyrighted works you grew up with would enter the public domain in time for your grandchildren to enter late middle age.<sup>37</sup> This shift in copyright happened to coincide with a shift in copyright ownership in general, away from the individual creators who had won ownership in 1709 toward corporate ownership of copyright.<sup>38</sup> While creative works are still done by individuals, the most profitable forms of creativity are reserved for corporate work. And, indeed, most of the most profitable forms of creativity are owned by one corporation: The Walt Disney Company.<sup>39</sup>

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<sup>33</sup> *The Incredible Shrinking Public Domain*, *supra* note 29 (“85% of copyrights were not renewed and went immediately into the public domain.”); Jenkins, *supra* note 32, at 6 (noting that the percentage was even higher – 93% – for non-renewals in books).

<sup>34</sup> See LAWRENCE LESSIG, *HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 135 (2004) (“In 1973, more than 85 percent of copyright owners failed to renew their copyright. That meant that the average term of copyright in 1973 was just 32.2 years. Because of the elimination of the renewal requirement, the average term of copyright is now the maximum term. In thirty years, then, the average term has tripled, from 32.2 years to 95 years.”); see also *What Could Have Entered the Public Domain on January 1, 2020*, DUKE L. SCH.: CTR. FOR STUDY PUBLIC DOMAIN, <https://web.law.duke.edu/cspd/publicdomainday/2020/pre-1976/> [<https://perma.cc/A4QQ-EB97>] (last visited Feb. 25, 2020) (contemplating the works that would have entered the public domain if the pre-1978, 28-year copyright terms were still in effect).

<sup>35</sup> See *What Could Have Entered the Public Domain on January 1, 2020*, *supra* note 34.

<sup>36</sup> 17 U.S.C.A. § 302 (2018) (stating that after Jan. 1, 1978, copyright in a work “endures for a term consisting of the life of the author and 70 years after the author’s death.”); Tushnet, *supra* note 32, at 543.

<sup>37</sup> See LESSIG, *supra* note 34, at 135.

<sup>38</sup> See *id.*

<sup>39</sup> See *Disney Reigns Supreme over the Film Industry*, *ECONOMIST* (Jan. 2, 2020), <https://www.economist.com/graphic-detail/2020/01/02/disney-reigns-supreme-over-the-film-industry> [<https://perma.cc/UAJ7-SK4H>]; David Sims, *Hollywood Makes Way for the Disney-Fox Behemoth*, *ATLANTIC* (Mar. 21, 2019), <https://>

Increased public access to works of creativity has always triggered a subsequent reaction in copyright holders seeking to tighten their monopoly. When copying was painstaking in the Middle Ages, no one worried about copyright; if you wanted another painting, you had to start from scratch with a blank canvas. There was no ability to record music; you experienced Vivaldi live or not at all. As it became easier to duplicate paintings and pass around recordings of Vivaldi, copyright emerged and increased its protection. And for those copyright holders, piracy of creativity has always threatened the creative world as we know it.<sup>40</sup> So, for instance, when the internet came along and made the copying and sharing of creative works easier than ever, the knee-jerk reaction, as it had been with the printing press, was to limit the technology itself.<sup>41</sup> This limitation ultimately failed, just as it had in the printing press scenario, too; technology, once out, can seldom be put back in the bag. However, it did eventually win some concessions for copyright holders, including the Copyright Term Extension Act of 1998<sup>42</sup> that froze the public domain for twenty years.<sup>43</sup>

Every expansion of copyright power results in an equivalent deprivation to the public domain. With every such expansion, the rights gained when a work passes into the public domain therefore increase. In the beginning, when copyright was still severely limited in both time and scope, the importance of the public domain was likewise more limited. But as copyright has expanded, the rights gained by the public when a work passes into the public domain have likewise expanded. Nowadays, a copyright holder does not just possess the right to copy their work; they also have the sole right to control the work being publicly displayed or performed.<sup>44</sup> If it is a piece of art, that can include the ability to show that art in the background

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[www.theatlantic.com/entertainment/archive/2019/03/disney-fox-merger-and-future-hollywood/585481/](http://www.theatlantic.com/entertainment/archive/2019/03/disney-fox-merger-and-future-hollywood/585481/) [https://perma.cc/894B-3JTK].

<sup>40</sup> See RONAN DEAZLEY, *On the Origin of the Right to Copy* 18 (2004); *Home Recordings of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794 H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the H. Comm. on the Judiciary*, 97th Cong. (1982); see also Transcript of Oral Argument at 11, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005) (No. 04-480) (“[F]or all I know, the monks had a fit when Gutenberg made his press.”).

<sup>41</sup> See Lee, *supra* note 8, at 313; Yu, *supra* note 10, at 2.

<sup>42</sup> See Pub. L. No. 105-298 (1998).

<sup>43</sup> See *The Incredible Shrinking Public Domain*, *supra* note 29.

<sup>44</sup> 17 U.S.C. § 106 (2018). The definitions of all of these terms – “public,” “performance,” and “display” – have also steadily expanded. Tushnet, *supra* note 32, at 542.

of a movie or television show.<sup>45</sup> If it is a dramatic work, that blocks the ability of all theater companies to produce the show.<sup>46</sup> If it is a musical work, that prohibits the showing of anyone performing that musical work.<sup>47</sup>

Consider the song “Happy Birthday,” sung at so many birthday parties every day. When that song was still under copyright, the copyright holder pulled in millions of dollars of licensing fees every time the song was sung publicly, including at birthday parties being depicted in documentaries.<sup>48</sup> When that song passed into the public domain, the public gained the right to sing “Happy Birthday.”<sup>49</sup> Thereafter, pop culture was able to welcome more realistic depictions of birthday celebrations.

These days a copyright also includes the right to create derivative works, which is statutorily defined as any work “based on” the original copyrighted work.<sup>50</sup> This is often understood to protect changes in media. So, for instance, the copyright holder in a book also has the exclusive right to make that book into a movie or play. However, it has also expanded beyond media to merchandising: “The derivative works right gives Disney the exclusive right to authorize stuffed animals, home videos, t-shirts, pencils, figurines, games, teapots, and anything else bearing images of characters from Disney’s copyrighted works.”<sup>51</sup> This means that those rights are also rights gained by the public when the work passes into the public domain – and correspondingly minimized for Disney.

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<sup>45</sup> Tushnet, *supra* note 32, at 542. See Alexandra Lyras, *Incidental Artwork in Television Scene Backgrounds: Fair Use or Copyright Infringement*, 2 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 159, 168-170 (1992) (discussing the intent behind the display right and giving case examples where an image in a television broadcast constituted infringement); see also 17 U.S.C. § 106 (2018) (granting copyright holders the exclusive right to display and perform their works publicly).

<sup>46</sup> See Tushnet, *supra* note 32, at 542; see also 17 U.S.C. § 106 (2018) (granting copyright holders the exclusive right to reproduce their copyrighted work).

<sup>47</sup> See Tushnet, *supra* note 32, at 542; see also 17 U.S.C. § 106 (granting copyright holders the exclusive right to display and perform their works publicly).

<sup>48</sup> Jenkins, *supra* note 32, at 20-22; “Happy Birthday” song officially recognized in public domain, CBS NEWS, June 27, 2016, <https://www.cbsnews.com/news/happy-birthday-song-officially-recognized-in-public-domain/> [https://perma.cc/Z5VY-UYFN].

<sup>49</sup> The litigation over “Happy Birthday” suggested that the song should have passed into the public domain earlier. Jenkins, *supra* note 32, at 20-22; “Happy Birthday” song officially recognized, *supra* note 48. This represents, therefore, a harm done to society at large, as all unjustified copyright grabs can be understood to be.

<sup>50</sup> *The Incredible Shrinking Public Domain*, *supra* note 29.

<sup>51</sup> Tushnet, *supra* note 32, at 542.

As mentioned, copyright has expanded not just in scope<sup>52</sup> but also in time. From the original term of fourteen years,<sup>53</sup> we have now arrived at life plus seventy years (or ninety-five or one-hundred-and-twenty years for corporate authors).<sup>54</sup> This is a considerable delay in the entry of works into the public domain. So, the public has many rights that it gains as soon as a work enters into the public domain, but it has had to wait longer and longer to gain access to those rights.

Therefore, the protection of the existing public domain is vitally important. While it remains ever-expanding as works continue (so far) to pass out of copyright, the public's active and engaged use of it has been somewhat hobbled, as it takes longer and longer for works the public cares about to enter the phase where they can freely be used and shared in a multiplicity of ways.<sup>55</sup> In fact, in the world we've set up, no member of the public will ever live long enough to engage on free and uninhibited terms with a new work of art<sup>56</sup>; the average copyright term is many decades longer than the average human lifespan. This is troubling in and of itself. As Salman Rushdie has eloquently noted, "those who do not have power over the story that dominates their lives, power to retell it, rethink it, deconstruct it, joke about it, and change it as times change, truly are powerless, because they cannot think new thoughts."<sup>57</sup> But this is even more troubling when coupled with the fact that Disney's works are removing from public interaction even those ancient texts that were left to us.

### C. *Disney's Plundering of the Public Domain*

It would be impossible to quantify the value of the public domain. As the eventual repository of all human creativity, it is too sprawling to ever fully categorize. The number of works created on any given day in any given year prior to 1920 is incalculable, and all of those works constitute the pub-

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<sup>52</sup> This includes expansion in scope as a consequence of technology itself. *See id.*

<sup>53</sup> *See The Incredible Shrinking Public Domain, supra* note 29.

<sup>54</sup> *See* Manjoo, *supra* note 32.

<sup>55</sup> The shrinking of the public domain is dangerous in other ways, too, resulting in the permanent loss of many works that cannot be preserved for future generations because of the operation of automatic lengthy copyright terms. *See The Incredible Shrinking Public Domain, supra* note 29.

<sup>56</sup> *See* Jenkins, *supra* note 32, at 1.

<sup>57</sup> *See* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533, 1536 (1993) (quoting Salman Rushdie, Excerpts from Rushdie's Address: 1,000 Days 'Trapped Inside a Metaphor', *N.Y. Times*, Dec. 12, 1991, at B8 (excerpts from speech delivered at Columbia University)).

lic domain. “[M]any more valuable works occupy the public domain than the private one, and its contributors are legion.”<sup>58</sup> And it is free, a bevy of incredible creativity that is anyone’s for the taking.<sup>59</sup> That means if you want to print your own copy of any Charles Dickens novel, or you want to make it available for free on the internet, you are free to do so and no one can stop you. As one writer put it, “You are free to make use of this heritage in any way you want, by publishing, digitizing, compiling, translating, adapting, dramatizing, or treating the material in any other way. It’s yours to enjoy and share with whomever, whenever, in whatever way you want.”<sup>60</sup>

Once a work is out of copyright, anyone can do as they wish with it. When that “anyone” is a behemoth corporation like Disney, however, that invariably limits the operation of the public domain. Disney has made an artform out of capturing, owning, and monetizing the extraordinary free resource of the public domain.

Mickey Mouse was arguably an original Walt Disney creation,<sup>61</sup> although other similar cartoon mice had existed before him,<sup>62</sup> and the title “Steamboat Willie” was a play off the Buster Keaton film *Steamboat Bill, Jr.*<sup>63</sup> Disney’s first feature-length cartoon, however, *Snow White and the Seven Dwarfs*,<sup>64</sup> was arguably unoriginal. Instead, it established a consistent pattern of using public-domain works for the basis of Disney movies. The essence of the film was taken from a nineteenth-century German fairy tale published by the Brothers Grimm,<sup>65</sup> which scholars in turn have theorized

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<sup>58</sup> Corynne McShery, *The Public Domain Is the Rule, Copyright is the Exception*, ELEC. FRONTIER FOUND. (Jan. 23, 2020), <https://www EFF.org/deeplinks/2020/01/public-domain-rule-copyright-exception> [<https://perma.cc/ZW6J-SNLE>].

<sup>59</sup> Gerald S. Jagorda, *The Mouse That Roars: Character Protection Strategies of Disney and Others*, 21 T. JEFFERSON L. REV. 235, 251 (1999).

<sup>60</sup> See E-mail from Wallace J. McLean, (Jan. 1, 2004), available at <https://www3.wcl.american.edu/cni/0401/35315.html> [<https://perma.cc/LU79-BH4L>].

<sup>61</sup> See Joseph Greener, *If You Give A Mouse A Trademark: Disney’s Monopoly on Trademarks in the Entertainment Industry*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 598, 609 (2015); Jessica Litman, *Mickey Mouse Emeritus: Character Protection and the Public Domain*, 11 U. MIAMI ENT. & SPORTS L. REV. 429, 433-34 (1994); Manjoo, *supra* note 32.

<sup>62</sup> See Greener, *supra* note 61, at 609; Litman, *supra* note 61, at 433-34; Manjoo, *supra* note 32.

<sup>63</sup> See Manjoo, *supra* note 32.

<sup>64</sup> See DAVE SMITH, *DISNEY A TO Z: THE OFFICIAL ENCYCLOPEDIA* 45 (1996).

<sup>65</sup> The Brothers Grimm were a proto-Disney, taking public domain works that had existed for centuries but fixing them in such a way as to gain copyright ownership over them. However, as the Brothers Grimm were operating in a time with a much more limited copyright monopoly, their harm to the public domain was comparably minimized.

was based on tales dating from as early as the sixteenth century.<sup>66</sup> As with many fairy tales, there are a number of different permutations of the Snow White story, but Disney's version has come to dominate our popular cultural narrative.<sup>67</sup>

*Snow White and the Seven Dwarfs* established early on the Disney penchant for embellishing the canon material to make it its own. Disney named the seven dwarfs in the movie (unnamed in the folk tales that we know of),<sup>68</sup> opting to use them as comedic relief. It also aged the protagonist,<sup>69</sup> shifted Snow White's first meeting with Prince Charming to earlier in the story,<sup>70</sup> chose a new method to kill the Queen,<sup>71</sup> and changed the internal organs of Snow White that the Queen covets from "lungs and liver" to the more emotional choice of "heart."<sup>72</sup> Disney also, of course, visually represented the characters, giving Snow White a distinctive appearance to make her instantly recognizable wherever fans might encounter her.<sup>73</sup>

*Snow White* was only the first of the Disney movies to mine existing stories for inspiration.<sup>74</sup> Disney's traditional feature-length cartoon movies were often based on old, oft-told stories in the public domain, there for anyone to take. Disney took advantage of this vast depository of free stories for movies including: *Pinocchio* (1940), based on the 1881 novel *The Adven-*

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<sup>66</sup> See BOB THOMAS, *DISNEY'S ART OF ANIMATION: FROM MICKEY MOUSE TO BEAUTY AND THE BEAST* (1991).

<sup>67</sup> See *id.*; M. Thomas Inge, *Walt Disney's Snow White and the Seven Dwarfs*, 32 J. POPULAR FILM & TELEVISION 132, 140 (2004) ("Disney stands in relation to the twentieth century as the Brothers Grimm did to the nineteenth century. He took their work and the writings of numerous other authors and tale-tellers and retold their stories through animation and film with such consummate skill that he made them the modern definitive versions and the best-known ones worldwide.").

<sup>68</sup> See Inge, *supra* note 67.

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> See THOMAS, *supra* note 66; NPR Staff, *Interview with Peggy Orenstein, Saving Our Daughters From An Army of Princesses*, NPR (Feb. 5, 2011, 1:36 PM), <https://www.npr.org/2011/02/05/133471639/saving-our-daughters-from-an-army-of-princesses> [<https://perma.cc/5VL9-XAVA>] (describing her daughter beginning preschool and stating that within a week, "She came home having memorized, as if by osmosis, all the names and gown colors of the Disney princesses"); see also Alexander M. Bruce, *The Role of the "Princess" in Walt Disney's Animated Films: Reactions of College Students*, STUDIES IN POPULAR CULTURE (2007), at 2 ("The [Disney] films became such prevalent fixtures that it is reasonable to say that most American children growing up in the 1990s who came from even moderately affluent families were raised on a steady diet of Disney.").

<sup>74</sup> See Manjoo, *supra* note 32.

tures of *Pinocchio* by Carlo Collodi;<sup>75</sup> *Cinderella* (1950), based on a folk tale that can be traced back to ancient Greece;<sup>76</sup> *Alice in Wonderland* (1951), based on the 1865 novel *Alice's Adventures in Wonderland* by Lewis Carroll;<sup>77</sup> *Sleeping Beauty* (1959), based on a fairy tale dating to the fourteenth century;<sup>78</sup> *The Jungle Book* (1967), based on the 1894 book by Rudyard Kipling;<sup>79</sup> *Robin Hood* (1973), based on the folk hero from the fifteenth century;<sup>80</sup> *Oliver & Company* (1988), based on the 1839 novel *Oliver Twist* by Charles Dickens;<sup>81</sup> *The Little Mermaid* (1989), based on a nineteenth-century fairy tale published by Hans Christian Andersen;<sup>82</sup> *Beauty and the Beast* (1991), based on an eighteenth-century fairy tale originally published by Gabrielle-Suzanne Barbot de Villeneuve;<sup>83</sup> *Aladdin* (1992), based on a Middle Eastern folk tale added to *The Book of One Thousand and One Nights* in the eighteenth century;<sup>84</sup> *The Hunchback of Notre Dame* (1996), based on the 1831 novel by Victor Hugo;<sup>85</sup> *Hercules* (1997), based on ancient Greek mythology;<sup>86</sup> *Mulan* (1998), based on a Chinese legend from the fifth century;<sup>87</sup> *Tangled* (2010), based on the German fairy tale “Rapunzel” dating back to the seventeenth century;<sup>88</sup> and *Frozen* (2013), based on the fairy tale “The Snow Queen” published by Hans Christian Andersen in 1844.<sup>89</sup> Indeed, while many of these fairy tales were collected and published in the past few centuries, recent scientific work has revealed that many of them may in fact be thousands of years old.<sup>90</sup>

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<sup>75</sup> See Derek Khanna, *50 Disney Movies Based on the Public Domain*, FORBES (Feb. 3, 2014, 10:12 AM), <https://www.forbes.com/sites/derekkhanna/2014/02/03/50-disney-movies-based-on-the-public-domain/> [<https://perma.cc/6GDM-RTQF>].

<sup>76</sup> See *id.*; Kelsey McKinney, *Disney Didn't Invent Cinderella. Her Story Is at Least 2,000 Years Old*, VOX (Mar. 15, 2015), <https://www.vox.com/2015/3/15/8214405/cinderella-fairy-tale-history> [<https://perma.cc/YS4E-87ER>].

<sup>77</sup> See Khanna, *supra* note 75.

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See *id.*

<sup>81</sup> See *id.*

<sup>82</sup> See *id.*

<sup>83</sup> See *id.*

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*

<sup>87</sup> See *id.*

<sup>88</sup> See *id.*

<sup>89</sup> See *id.* This list doesn't even include *The Lion King*, clearly based on Shakespeare's play *Hamlet*.

<sup>90</sup> See *Fairy Tale Origins Thousands of Years Old, Researchers Say*, *supra* note 1.

All of these movies followed the pattern set by *Snow White*: using the public domain material for inspiration on which to hang many of Disney's original flourishes. The resulting movies are skillful combinations of familiar stories and fresh Disney spin. Disney has now begun to spin those animated features into other derivative works, including stage musicals<sup>91</sup> and live-action films.<sup>92</sup> Each new embellishment on the tale starts a copy-right clock ticking for that new embellishment,<sup>93</sup> thus extending Disney's ownership.

### III. DISNEY'S CONQUERING COPYRIGHT

The trouble is not Disney's use of the public domain, which in and of itself would not be problematic. All of us are free to use the public domain, and all of us are free to possess copyrights in the original parts of the works that result. The trouble is coupling the monopoly of copyright with Disney's overall monopoly power in the creative culture. Disney's tactics of enforcing its intellectual property through legislative lobbying, aggressive litigation, strategic trademarking, and other anti-competitive acts combine to increase and expand Disney's copyright in an imperial fashion, not just protecting creativity going forward but reaching backward to "re-copy-right" public domain works that had belonged to all of us.

#### A. Legislative Lobbying

The Copyright Term Extension Act that went into effect in 1998 retroactively extended copyright terms by twenty years, thus freezing the public domain for twenty years.<sup>94</sup> The Walt Disney Company was so much a beneficiary of the copyright term extension that it was dubbed "the Mickey

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<sup>91</sup> See Khanna, *supra* note 75.

<sup>92</sup> See Mahita Gajanan, *Here Are All of Disney's Upcoming Live-Action Movies*, TIME (Feb. 13, 2020, 1:22 PM), <https://time.com/4525871/disney-live-action-movies/> [<https://perma.cc/4ES7-45SU>].

<sup>93</sup> So, for instance, when musical compositions pass into the public domain, newer recordings of those compositions retain copyright protection due to their original additions. See Jenkins, *supra* note 32, at 21-22; Samantha Cole, *Public Domain Day 2020: These 95-Year-Old Works Are Now Free to Use*, VICE (Jan. 2, 2020), [https://www.vice.com/en\\_us/article/akwd7b/best-of-public-domain-day-2020](https://www.vice.com/en_us/article/akwd7b/best-of-public-domain-day-2020) [<https://perma.cc/K94L-J8HP>].

<sup>94</sup> See Cole, *supra* note 93; Lawrence Lessig, *Public Domain Day – in Canada*, LESSIG 2.0 (Jan. 1, 2004), [https://web.archive.org/web/20070701052954/http://lessig.org/blog/2004/01/public\\_domain\\_day\\_in\\_canada.html](https://web.archive.org/web/20070701052954/http://lessig.org/blog/2004/01/public_domain_day_in_canada.html) [<https://perma.cc/8QYE-FDMF>].



Mouse Copyright Act” by some commentators.<sup>95</sup> The act gave Disney an extra twenty years of protection over such aging creative properties as Mickey Mouse’s original appearance in “Steamboat Willie” and A.A. Milne’s Winnie-the-Pooh stories.<sup>96</sup> The benefit to Disney had a corresponding harm to society: the shared collective of creativity, held in common by all people, stopped growing.

The Copyright Term Extension Act of 1998 ushered in fears of continual copyright term extensions and triggered a Supreme Court challenge (holding that deference should be given to Congress on the length of the copyright term).<sup>97</sup> People have learned to view copyright protection as the default state of the world and public domain freedom as unusual. For instance, James L. W. West III, a professor emeritus at Pennsylvania State University and a scholar dedicated to F. Scott Fitzgerald, was quoted as lamenting the upcoming expiration of the copyright on *The Great Gatsby*: “I wish it were possible for the Fitzgerald Trust to retain copyright. . . . They have been wonderful caretakers of Fitzgerald’s literary rights and his reputation.”<sup>98</sup> West acknowledged that copyright law operates to maintain a public domain,<sup>99</sup> but expressed only dubious support for the system: “That’s probably as it should be.”<sup>100</sup>

Similarly, when articles discuss the copyright expirations, they often feel it necessary to justify the entire idea. For instance, the Electronic Frontier Foundation recently published a piece with a headline straightforwardly reminding people, “The Public Domain Is the Rule, Copyright Is the Exception.”<sup>101</sup> The EFF attempted to remind people “that most production of knowledge and culture has always taken place within the public domain,”<sup>102</sup> at a time when ownership of creativity has come to be perceived as more

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<sup>95</sup> See, e.g., Greener, *supra* note 61, at 608; Manjoo, *supra* note 32; *Public Domain Day 2020*, DUKE LAW SCH.: CTR. FOR STUDY PUBLIC DOMAIN, <https://web.law.duke.edu/cspd/publicdomainday/2020/> [https://perma.cc/HF2P-WLSK] (last visited Mar. 9, 2020).

<sup>96</sup> See Greener, *supra* note 61, at 608; *Public Domain Day 2020*, *supra* note 95.

<sup>97</sup> See Greener, *supra* note 61, at 608; *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

<sup>98</sup> See Cole, *supra* note 93; Hillel Italie, *Everyone Invited: ‘Great Gatsby’ Copyright to End in 2021*, AP NEWS (Jan. 22, 2020), <https://apnews.com/27697da003ea226a4f66c3923fd84b9c> [https://perma.cc/VYZ8-UF5P].

<sup>99</sup> See Italie, *supra* note 98 (“[U]nder our laws all literary works eventually belong to the people.”).

<sup>100</sup> *Id.*

<sup>101</sup> Corynne McSherry, *The Public Domain Is the Rule, Copyright is the Exception*, ELEC. FRONTIER FOUND. (Jan. 23, 2020), <https://www.eff.org/deeplinks/2020/01/public-domain-rule-copyright-exception> [https://perma.cc/HT2F-KVY2].

<sup>102</sup> *Id.*

natural than free creativity. Disney and other copyright holders have successfully convinced many segments of society that the public benefit was on the side of a longer copyright monopoly and a smaller public domain.<sup>103</sup> During the debate over the Copyright Term Extension Act, the prevailing attitude seemed to be so heavily in favor of expanding copyright terms that one Congressional witness “suggested that copyright should last as long as possible.”<sup>104</sup> Indeed, articles about the upcoming expiration of copyrights often muse upon how the copyright holder will “hold on to as much of the market as it can,”<sup>105</sup> which is hardly in the spirit of the public domain. And while you might not expect copyright holders to ever willingly sacrifice a revenue stream — no matter how many decades that revenue stream has already been exploited — the expectation that copyright expiration would naturally lead to some attempt to minimize the public domain effects should be a worrying one.

Although Disney did not lobby for another expansion of the Copyright Term Extension Act, Disney has begun to flex its lobbying muscles in other ways designed to protect its monopoly power. For instance, Disney has begun to lobby in favor of efforts to decrease the immunity granted by Section 230.<sup>106</sup> That legislative section in its original form provided broad immunity to internet platforms protecting them from liability for content provided by users.<sup>107</sup> Section 230 always had an exception for intellectual property violations,<sup>108</sup> but the landmark litigation of FOSTA/SESTA (Fight Online Sex Trafficking Act/Stop Enabling Sex Traffickers Act) for the first time introduced additional carveouts of the immunity protection, focused on sex trafficking.<sup>109</sup> Disney lobbied in favor of FOSTA/SESTA,<sup>110</sup> and while a

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<sup>103</sup> See Litman, *supra* note 61, at 431.

<sup>104</sup> *Id.*

<sup>105</sup> Italic, *supra* note 98.

<sup>106</sup> 47 U.S.C. § 230; David McCabe, *IBM, Marriott and Mickey Mouse Take on Tech's Favorite Law*, N.Y. TIMES, Feb. 4, 2020, <https://www.nytimes.com/2020/02/04/technology/section-230-lobby.html> [<https://perma.cc/H2HV-WGGY>].

<sup>107</sup> Joe Mullin, *How FOSTA Could Give Hollywood the Filter It's Long Wanted*, ELEC. FRONTIER FOUND., <https://www.eff.org/deeplinks/2018/03/how-fosta-will-get-hollywood-filters-theyve-long-wanted> [<https://perma.cc/XQ6W-2ZXF>].

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

<sup>109</sup> Eric Goldman, *The Complicated Story of Fosta and Section 230*, 17 FIRST AMEND. L. REV. 279, 280 (2018). See Karen Gullo & David Greene, *With FOSTA Already Leading to Censorship, Plaintiffs Are Seeking Reinstatement of Their Lawsuit Challenging the Law's Constitutionality*, ELEC. FRONTIER FOUND. (Mar. 1, 2019), <https://www.eff.org/deeplinks/2019/02/fosta-already-leading-censorship-we-are-seeking-reinstatement-our-lawsuit> [<https://perma.cc/7S78-G4X3>]; Jennifer Musto, *FOSTA, Sex Trafficking, and Automated Anti-Trafficking Interventions*, U. CAL. PRESS: UC

public stance against sex trafficking makes perfect sense, it has become clear that Disney's true aim seems to be to chip away at Section 230 immunity as it has since joined other lobbying efforts to introduce further Section 230 carveouts.<sup>111</sup> In the absence of the straightforward assistance of an additional copyright term extension, Disney has begun to construct an elaborate system of legal protections that it can use to effectively act as extensions of copyright. Creating greater liability for internet platforms will provide Disney with more leverage over how those platforms behave.

### B. *Litigation Tactics*

With long, broad, and strong copyright protection established, Disney has turned frequently to the legal system for support. In this way, Disney has sometimes successfully parlayed its copyright on its added aspects to re-copyright the public domain material at the heart of its properties. Such misuse of copyright does not just harm the defendant in these actions; by keeping works out of the public domain, it harms the entire creative culture.

In one case, Filmation Associates made a number of animated features, including movies based on the public domain works of *The Adventures of Pinocchio*, *Alice's Adventures in Wonderland*, and *The Jungle Book*.<sup>112</sup> Disney sued for, among other things, copyright infringement, based on its copyrighted animated movies based on those same public domain works.<sup>113</sup> Filmation did not dispute that there was some similarity between its movies and Disney movies, since they were "concededly taken from specific literary characters within the public domain."<sup>114</sup> Therefore, the case revolved around whether the expression of those similar ideas was too similar.<sup>115</sup> The court noted that this is a question often difficult to decide on summary judgment and that reasonable people could disagree on the issue.<sup>116</sup> But given the dominance of Disney's expressive works in society and the diminishing profile of the public domain as an important part of creative culture, it is not difficult to imagine that jurors might be confused by the idea that defend-

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PRESS BLOG (June 1, 2019), <https://www.ucpress.edu/blog/44576/fosta-sex-trafficking-interventions-2/> [<https://perma.cc/NA4K-P2DA>].

<sup>110</sup> See Mullin, *supra* note 107 ("Hollywood is lobbying for laws that will force online intermediaries to shut down user speech.")

<sup>111</sup> See *id.*; McCabe, *supra* note 106.

<sup>112</sup> See *Walt Disney Productions v. Filmation Associates*, 628 F. Supp. 871, 876 (C.D. Cal. 1986).

<sup>113</sup> See *id.* at 881.

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

<sup>115</sup> See *id.* at 883.

<sup>116</sup> See *id.* at 880.

ants should be allowed to make their own movies when Disney got there first.

One might assert that surely Filmtation was free-riding on Disney's popularity: Disney did the work to make *The Adventures of Pinocchio* a familiar property in late-twentieth-century America, and so Disney and Disney alone should reap those rewards. That, after all, is exactly what copyright is for: Disney was incentivized to make its movies, secure in the knowledge that it would be protected in its efforts to profit off of them. But the effect of that is to take many works that otherwise would have been in the public domain and "re-copyright" them. Where once Filmtation could have just made a movie about *The Adventures of Pinocchio*, now Filmtation must be sure to skirt widely around Disney's version of that movie, because copyright infringement is now in play, where it was not before.<sup>117</sup>

Of course, this is always the case with new works based on public domain properties, but Disney's unparalleled dominance makes the consequences of re-copyrighting more acute. Whereas many versions of public domain properties like Sherlock Holmes or even Hercules might coexist (Disney movies *The Great Mouse Detective* and *Hercules* notwithstanding), Disney's dominance means that it has grown increasingly difficult to reference Snow White without a Disney princess coming to mind, no matter the origins of the fairy tale.<sup>118</sup> Public domain princesses need to look recognizably like the Disney princesses for children to accept that they are the princess in question.<sup>119</sup> Try convincing your child of a Snow White who does not look like Disney's.<sup>120</sup> While you might try to remind the world that Snow White is in the public domain and not owned by Disney, Disney will have different ideas, and has in the past sued companies providing costumed princesses at children's birthday parties.<sup>121</sup> Disney is not always successful in these litiga-

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<sup>117</sup> Nor does Disney give other intellectual property rightsholders a similar courtesy. Disney's "re-copyrighting" activities are not limited to the public domain or the copyright realm. Litigations have revealed that it employs a similarly imperial attitude toward trademarked designs, using images of the products of others in creating its own merchandise. See *Thoip v. Walt Disney Co.*, 736 F. Supp. 2d 689 (S.D.N.Y. 2010).

<sup>118</sup> See Jagorda, *supra* note 59, at 235; Litman, *supra* note 61, at 432.

<sup>119</sup> See Gordon, *supra* note 57, at 1535-36 (noting that Disney has "influenced generations of children"); see also Bruce, *supra* note 73; Orenstein, *supra* note 73.

<sup>120</sup> See Gordon, *supra* note 57 (noting that Disney has "influenced generations of children"); see also Bruce, *supra* note 73; Orenstein, *supra* note 73.

<sup>121</sup> *Disney Ent., Inc. v. Sarelli*, 322 F. Supp. 3d 413, 428 (S.D.N.Y. 2018), *reconsideration denied*, No. 16 Civ. 2340 (GBD), 2018 WL 5019745 (S.D.N.Y. Sept. 26, 2018).

tions,<sup>122</sup> but the very threat of litigation can be enough to give Disney the widespread ability to own the entire concept of Snow White in practice.<sup>123</sup> Often litigations are not about the final legal victory but more about the costs that can be levied on the other side as the case drags on. Very few defendants have the resources to take on Disney, and a threat of litigation can be enough to secure the victory Disney wants<sup>124</sup> (and one that might or might not have been possible in court).

Courts have cautioned Disney against misusing its copyrights to expand their protection in unacceptable ways.<sup>125</sup> But such cautions have done little to stop Disney's conquering copyrights. As Disney's multiple live-action remakes have begun to hit the cinemas, commentators have begun to notice that Disney's perpetual remakes allow it to effectively keep restarting the copyright clock.<sup>126</sup> While, as has been discussed, it can only capture ownership of the new things it adds to the remake, Disney's cultural dominance and aggressive approach to copyright protection mean that it can creep its copyright protection to continue to embrace aspects of works that should have belonged to the public at large long ago. Indeed, Disney's media ownership is now so extensive that in a way it has brought us back to the sixteenth-century pre-copyright state, when a small number of entities possessed all the creative rights.<sup>127</sup>

### C. *The Trademark Angle*

Courts have scolded copyright holders trying to expand their copyright protection by pointing out that the idea of a "perpetual copyright" would turn copyrights into trademarks, which do last forever as long as they're being used.<sup>128</sup> Disney has definitely embraced that tactic.<sup>129</sup> While there may have been no copyright term extension granting Disney additional time on "Steamboat Willie" once the Copyright Term Extension Act of 1998

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<sup>122</sup> See *id.*

<sup>123</sup> See Greener, *supra* note 61, at 607 (discussing the success of this tactic in giving Disney ownership over many depictions of mice); Jagorda, *supra* note 59, at 236.

<sup>124</sup> See Greener, *supra* note 61, at 606-07.

<sup>125</sup> See, e.g., Redbox Automated Retail, LLC v. Buena Vista Home Ent., Inc., 399 F. Supp. 3d 1018, 1026 (C.D. Cal. 2019).

<sup>126</sup> See Jenkins, *supra* note 32, at 21-22 (discussing how small changes to a work could "keep the copyright clock ticking"); Khanna, *supra* note 75.

<sup>127</sup> See Lee, *supra* note 8, at 320.

<sup>128</sup> See 15 U.S.C. § 1127 (2006).

<sup>129</sup> See Jagorda, *supra* note 59, at 243.

expired,<sup>130</sup> Disney has taken care of that itself by trademarking particular “Steamboat Willie” clips.<sup>131</sup> This will allow Disney, after its copyright has expired, to continue to assert ownership over “Steamboat Willie” on a trademark theory: if people associate “Steamboat Willie” with Disney goods, then others using it in a public domain way could cause confusion.<sup>132</sup>

Disney is known to sue over the use of its characters in “live children’s entertainment services,”<sup>133</sup> including characters like Eeyore and Tigger, both of which will soon join the public domain. However, because Disney also asserts EYORE and TIGGER as trademark terms for many things, including “live performances by costumed characters,”<sup>134</sup> Eeyore and Tigger may effectively never join the public domain, granting to Disney a level of protection akin to a permanent copyright. Disney has thousands of these trademarks, covering the name of nearly every possible character.<sup>135</sup> Copy-

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<sup>130</sup> See Glenn Fleishman, *For the First Time in More Than 20 Years, Copyrighted Works Will Enter the Public Domain*, SMITHSONIAN MAG., Jan. 2019, <https://www.smithsonianmag.com/arts-culture/first-time-20-years-copyrighted-works-enter-public-domain-180971016/> [<https://perma.cc/5ESC-NYM4>].

<sup>131</sup> See *id.* (noting that Disney’s recent use of Steamboat Willie cartoons during the opening of new films “is a rock-solid trademark use of Disney’s content. In effect, Disney is not only reinforcing its trademark rights in Mickey Mouse but they have created trademark rights in the iteration of Mickey Mouse as he appeared in Steamboat Willie”).

<sup>132</sup> See *id.* (stating that Disney’s use of the Steamboat Willie property, “will make it very difficult, if not impossible, for would-be competitors to capitalize on the expiration of the Steamboat Willie copyright”).

<sup>133</sup> See *Disney Enter., Inc. v. Sarelli*, 322 F. Supp. 3d 413, 428 (S.D.N.Y. 2018), reconsideration denied, No. 16 CIV. 2340 (GBD), 2018 WL 5019745 (S.D.N.Y. Sept. 26, 2018).

<sup>134</sup> See TIGGER, Registration No. 4739239; EYORE, Registration No. 4576085.

<sup>135</sup> A simple search for Disney trademark ownership in the U.S. Trademark and Patent Office trademark database returns approximately 6,400 results. Clearly not all of those are for graphic characters and some of those marks are either dead or have been abandoned, but there still remains a large number of registrations for characters. For example, even though *Winnie the Pooh* was originally created by A.A. Milne, Disney has filed trademark registrations covering entertainment services for the following characters: WINNIE THE POOH, Registration No. 4739240; TIGGER, Registration No. 4739239; EYORE, Registration No. 4576085; and PIGLET, Registration No. 4118780. Disney has also filed registrations for entertainment services for the following characters from *The Jungle Book*, which was originally written by Rudyard Kipling: BALOO, Registration No. 5271890; SHERE KAHN, Registration No. 5257020; KAA, Registration No. 5257012; and BAGHEERA, Registration No. 5242223 (these lists are non-exhaustive).

right is practically irrelevant if you can use trademark to block people's access to the public domain.<sup>136</sup>

The interaction of perpetual trademarks with expiring copyrights is something with which courts have struggled. There have been valiant attempts to ensure that failed copyright claims do not convert into trademark claims, protecting against a second bite at the apple.<sup>137</sup> However, so far these cases have been relatively straightforward to decide on uncontroversial grounds because the underlying creative product has not served as a functioning trademark.<sup>138</sup> Where it is a closer question whether the underlying creative work functioned as a trademark, it appears that courts might be ready to permit trademark protection.<sup>139</sup> Many Disney properties *are* arguably functioning as trademarks<sup>140</sup>; certainly, the number of graphic characters Disney has registered as trademarks would seem to indicate as much.<sup>141</sup> Indeed, in dicta in a nonprecedential opinion, the Trademark Trial and Appeal Board has already acknowledged that Mickey Mouse functions as a mark.<sup>142</sup> Cases opening the door for Disney to pivot from copyright to trademark protection will surely grow in number as copyright expirations will lead Disney to lean more heavily on its stable of thousands of trademarks.<sup>143</sup>

Courts have been receptive to Disney's trademark arguments used in conjunction with copyright claims. In the *Filmation* case discussed *supra*, Disney also brought trademark claims, which the court affirmed by finding that consumers would be confused between Disney's movies and Filmation's versions.<sup>144</sup> Thus, even if the unowned public domain were given more land-

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<sup>136</sup> See Litman, *supra* note 61, at 432.

<sup>137</sup> See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-38 (2003).

<sup>138</sup> See *Comedy III Prods. Inc. v. New Line Cinema*, No. CV 97-3628 ABC VAPx, 1998 WL 334866, at \*7 (C.D. Cal. 1998), *aff'd*, 200 F.3d 593 (9th Cir. 2000), *as amended on denial of reb'g and reb'g en banc* (Feb. 4, 2000); *Sony Pictures Ent., Inc. v. Fireworks Ent., Inc.*, 137 F. Supp. 2d 1177, 1196-97 (C.D. Cal. 2001), *vacated pursuant to settlement*, No. 01-00723(ABC)(JWJX), 2002 WL 32387901 (C.D. Cal. 2002).

<sup>139</sup> See *Sony Pictures Ent., Inc.*, 137 F. Supp. 2d at 1196-97; *Frederick Warne & Co. v. Book Sales Inc.*, 481 F. Supp. 1191, 1196 (S.D.N.Y. 1979).

<sup>140</sup> See *Frederick Warne & Co.*, 481 F. Supp. at 1196 ("Dual protection under copyright and trademark laws is particularly appropriate for graphic representations of characters.").

<sup>141</sup> See, e.g., *supra* note 135.

<sup>142</sup> See *In Re Me & the Mouse Travel, LLC*, No. 76717725, 2017 WL 2297898, at \*3 (T.T.A.B. Apr. 21, 2017) ("The probative evidence establishes both that Disney is a well-known company and that Mickey is a famous character and mark.").

<sup>143</sup> See Greener, *supra* note 61, at 606.

<sup>144</sup> See *id.* at 609.

scape in the Disney copyright universe, courts have already begun to allow Disney to bootstrap trademark protection into its imperial efforts.<sup>145</sup> Even if Filimation had skirted a wide berth around Disney's original embellishments to the public domain, its use of the public domain titles to refer to its works may still have gotten it into trouble based on the fact that Disney owns trademarks in many public domain titles like *The Jungle Book*,<sup>146</sup> *Pinocchio*,<sup>147</sup> and *Alice in Wonderland*,<sup>148</sup> including exclusive rights to use these words to identify motion pictures. To take advantage of the public domain, one would be allowed only to make the most convoluted references to it.

In a recent case, the court dismissed Disney's trademark infringement claim based on no likelihood of confusion between its marks and the costumed performers attending children's parties, but the dilution claims survived, as did the copyright infringement claim.<sup>149</sup> The defense in that case argued that it was using the free public domain versions of the characters,<sup>150</sup> which would have addressed the copyright claim but not the dilution claim. If Disney's marks are famous — which many of them arguably are due to Disney's virtual cultural monopoly<sup>151</sup> — then the expansive nature of dilution law, requiring no confusion, competition, or harm,<sup>152</sup> could allow Disney to swallow copyright law whole. In this situation, not only could Disney manage to achieve perpetual protection over a copyrighted work, but it could manage to do so with public domain works that it has re-copyrighted. Its conquest of the public domain would be complete.

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<sup>145</sup> See Jagorda, *supra* note 59, at 246 (“Here Disney was able to make its claim to a series of works where it had not created the characters, had not been responsible for the original stories, and where the tales on which their films were based had long since entered the public domain. Regardless, Disney was able to establish there was a sufficient link between their product and the public perception that they were at least entitled to their day in court to show the possibility of confusion.”).

<sup>146</sup> See Registration No. 5944363; 5938252; 5932233, et al.

<sup>147</sup> See Registration No. 4262061; 3773508; 4799894, et al.

<sup>148</sup> See Registration No. 3993300; 3829626; 3794925, et al.

<sup>149</sup> See *Disney Ent. v. Sarelli*, 322 F. Supp. 3d 413, 444 (S.D.N.Y. 2018), *reconsideration denied*, No. 16 Civ. 2340 (GBD), 2018 WL 5019745 (S.D.N.Y. 2018).

<sup>150</sup> See *id.* at 442-43.

<sup>151</sup> See *In Re Me & the Mouse Travel, LLC*, No. 76717725, 2017 WL 2297898, at \*3 (T.T.A.B. Apr. 21, 2017) (remarking that Mickey Mouse is a famous mark); *Thoip v. Walt Disney Co.*, 736 F. Supp. 2d 689, 711 (S.D.N.Y. 2010) (noting in dicta “the fame of Disney’s characters and its name”); Jagorda, *supra* note 59, at 242 (noting that Disney’s characters are “American icons”).

<sup>152</sup> See 15 U.S.C. § 1125 (2012).



*D. Other Anticompetitive Measures*

Because of the structure of online copyright — where many of today’s copyright disputes take place — Disney does not even have to threaten litigation to protect its monopoly. It merely has to submit notices under the Digital Millennium Copyright Act.<sup>153</sup> While such notices statutorily require that they be made in good faith,<sup>154</sup> that requirement is seldom explored in any substantive fashion, and examples of algorithmic DMCA notices removing obvious instances of fair use or even properly licensed uses abound.<sup>155</sup> At any rate, most DMCA notices go unchallenged, even when the grounds are clearly questionable.<sup>156</sup> Therefore, there is little policing of DMCA notices, and thus little reason not to use them in questionable ways to expand protection. For instance, recently the Disney movie *Captain Marvel* revealed a deleted scene.<sup>157</sup> A number of YouTubers engaged in criticism regarding the scene and used the scene to illustrate that criticism.<sup>158</sup> Such criticism is ordinarily a protected fair use as one of the quintessential enumerated fair use categories,<sup>159</sup> and there is little indication that the use of the scene in any of the videos in question was excessive.<sup>160</sup> That did not stop Disney from issuing DMCA notices to remove all of the videos,<sup>161</sup> which effectively put an end to criticism, allowing Disney to spin its copyright power into a shaping of public discourse and viewpoint discrimination. While fair use is generally understood to be one of the methods by which

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<sup>153</sup> See 17 U.S.C. § 512(c)(3) (2012) (describing effective notification elements).

<sup>154</sup> See 17 U.S.C. § 512(c)(3)(A)(v) (2012).

<sup>155</sup> See Timothy Geigner, *Google Report: 99.95 Percent of DMCA Takedown Notices Are Bot-Generated Bullshit Bucksbot*, TECHDIRT (Feb, 23, 2017), <https://www.techdirt.com/articles/20170223/06160336772/google-report-9995-percent-dmca-takedown-notices-are-bot-generated-bullshit-bucksbot.shtml> [https://perma.cc/7G46-DJE7]; see Matthew Schonauer, *Let the Babies Dance: Strengthening Fair Use and Stifling Abuse in DMCA Notice and Takedown Procedures*, 7 I/S: J.L. & POL’Y FOR INFO. SOC’Y 135, 152-58 (2011).

<sup>156</sup> See Schonauer, *supra* note 155; Geigner, *supra* note 155.

<sup>157</sup> See Didi Rancovik, *Disney “Copyright Claims” YouTube Channels That Criticize Captain Marvel*, RECLAIMTHENET (May 31, 2019), <https://reclaimthenet.org/disney-copyright-claims-youtube-channels-that-criticize-captain-marvel/> [https://perma.cc/E3GV-MYLH].

<sup>158</sup> See *id.*

<sup>159</sup> See 17 U.S.C. § 107 (2012).

<sup>160</sup> See Rancovik, *supra* note 157.

<sup>161</sup> See *id.*

the First Amendment is protected in copyright law,<sup>162</sup> it loses its efficacy as a doctrine in the heavily unsupervised DMCA context.

The extent of Disney's dominance in the creative industries means that other actions that might have had relatively inconsequential effects gain outsized importance when Disney does them. For instance, Disney has long had a history of "vaulting" its titles: making them unavailable for long periods of time to create artificial scarcity, thus increasing their value when they are eventually made available.<sup>163</sup> Now that Disney owns Twentieth Century Fox and its substantial movie library, Disney has begun to exercise the same technique with Fox titles.<sup>164</sup> This includes a number of titles, like *The Sound of Music*, *Alien*, and *Fight Club*, that have long been reliable, dependable money-makers for small theatres.<sup>165</sup> On their own they are no longer blockbusters, but independent theatres, looking for any way to create, have found valuable niches showing cult classics like these.<sup>166</sup> Disney has begun to remove the entire back catalog of Twentieth Century Fox from licensing discussions.<sup>167</sup> The ripple effect of this could be sizable. Yes, it may drive up the price for those movies when Disney eventually makes them available again, but in the meantime, it will further weaken small theatres' ability to compete against large chains and streaming services.<sup>168</sup> If small theatres fail, this will in turn limit independent films' ability to find an audience, since large chains often do not find it financially worthwhile to exhibit smaller movies.<sup>169</sup> Disney's move to exercise its rights as a copyright holder and deny access to movies thus has the effect of exacerbating the problem of cultural power being consolidated in the hands of fewer and fewer entities.

Moreover, many in the theatre industry have expressed reluctance to speak about Disney's conduct on the record, for fear of reprisal.<sup>170</sup> Little could be more indicative of the lopsided power structure existing between

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<sup>162</sup> See Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831, 852 (2010).

<sup>163</sup> See Matt Zoller Seitz, *Disney Is Quietly Placing Classic Fox Movies into Its Vault, and That's Worrying*, VULTURE (Oct. 24, 2019), <https://www.vulture.com/2019/10/disney-is-quietly-placing-classic-fox-movies-into-its-vault.html> [https://perma.cc/WRD6-L39K].

<sup>164</sup> See *id.*

<sup>165</sup> See *id.*

<sup>166</sup> See *id.*

<sup>167</sup> See *id.*

<sup>168</sup> Perhaps most telling of the amount of power Disney has over the industry as a whole, many people refused to speak out on the record against Disney's actions, aware that they cannot afford to get on Disney's bad side. See *id.*

<sup>169</sup> See *id.*

<sup>170</sup> See *id.*

Disney and the movie theatre owners. Nor are the theatre owners irrational to fear reprisal: in a trademark litigation with DJ deadmau5 over his use of a mouse-shaped helmet, Disney leaned on its movie studios to retract offers to work with deadmau5 on two different projects, *Star Wars Rebels* and *Fantasia*, and then exerted pressure on its television network to cancel an appearance by deadmau5 on *Jimmy Kimmel Live!*.<sup>171</sup> It makes sense that a company would not want to do business with a person against whom it was litigating, but the reach of the Disney empire makes any stance against it an especially dangerous one.

#### IV. WHAT CAN WE DO

Taken individually, maybe none of these actions by Disney raise alarm. While some of them may be questionable, such as the overuse of DMCA notices, many of them are in fact nothing but the proper exercise of legal rights. So, the current political system welcomes Disney's lobbying efforts. So, too, does trademark law function to protect Disney's extensive marketplace. Disney has the right to use works from the public domain just as much as the rest of us. And, finally, Disney also has the power to use its government-granted copyright monopoly to create artificial scarcity – the way copyright has always functioned.

Taken as a whole, however, the pattern of Disney's behavior is alarming. The public domain was always built on a theory that society needed access to creative capital in order to progress.<sup>172</sup> Stories build upon stories, and the public domain operated to ensure that system. Copyright was intended to be a balance between the creator's power and the public's rights.<sup>173</sup> As the public domain has stalled, copyright scope and duration has expanded, and that, coupled with Disney's aggressive tactics in other areas of the law, has left society with a precarious relationship to the creativity that many would say is so important to civilization.<sup>174</sup>

Perhaps nothing illustrates that better than Disney's vaulting practice. When Disney "vaults" a movie, traditionally it renders that movie unavailable everywhere.<sup>175</sup> There is nowhere for a person to legally view the movie, unless that person happens to be friends with someone who legally bought it

<sup>171</sup> See Greener, *supra* note 61, at 599.

<sup>172</sup> See *Why the Public Domain Matters*, DUKE LAW SCH.: CTR. FOR STUDY PUBLIC DOMAIN, <https://web.law.duke.edu/cspd/publicdomainday/2019/why/> [https://perma.cc/V6KY-GM3N] (last visited Dec. 27, 2020).

<sup>173</sup> See Jagorda, *supra* note 59, at 235.

<sup>174</sup> See *id.* at 251.

<sup>175</sup> See Seitz, *supra* note 163.

before it disappeared. What harm, you may ask, comes from removing vast swaths of creativity from the cultural experience? After all, that creativity, Disney's actions remind us, does not belong to us.

Except that, in certain circumstances, it is crystal clear exactly how much creativity means to human beings. It is not simply evident in the way children experience Walt Disney World; it is evident in adult behavior as well. In articles discussing the disappearance of Twentieth Century Fox movies from small theaters, one movie was upheld as a notable exception: *The Rocky Horror Picture Show*.<sup>176</sup> An incomparable cult favorite, *The Rocky Horror Picture Show* is the subject of hundreds of midnight showings across the country every year.<sup>177</sup> It is a uniquely communal experience, so beloved that some have speculated that not even Disney will risk the "full-scale revolt" that would result from its inaccessibility.<sup>178</sup> This is an acknowledgment of the importance that some cultural properties come to hold to society as a whole. Their loss would be considered, on a certain level, catastrophic. But their loss is not within our control. *The Rocky Horror Picture Show* is owned by Disney. Our relationship with it is fragile and subject to Disney's whims. You might feel a kinship for the communal *Rocky Horror Picture Show* experience but, frankly, that experience does not belong to you, and it never will. *The Rocky Horror Picture Show* will not enter the public domain until 2070. In the meantime, it is subject to Disney's full arsenal of imperial copyright.

In addition, Disney often performs these tactics on works that previously belonged to the public domain. That in itself is neither alarming nor unusual.<sup>179</sup> But Disney is a special case. While Disney is only entitled to copyright on the original bits it has added to the work, the entire work becomes so entangled that determining where Disney's ownership begins and public domain ends can be tricky. The oddity of copyrighted works

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<sup>176</sup> See *id.*

<sup>177</sup> See *id.*; Katharine Schwab, *After 40 Years, Rocky Horror Has Become Mainstream*, ATLANTIC (Sept. 26, 2015), <https://www.theatlantic.com/entertainment/archive/2015/09/after-40-years-rocky-horror-has-become-mainstream/407491/> [<https://perma.cc/BXZ5-JN6Q>].

<sup>178</sup> See Seitz, *supra* note 163.

<sup>179</sup> See Katherine J. Wu, *Start of 2020 Usbers Thousands of Once-Copyrighted Works into the Public Domain*, SMITHSONIAN MAG. (Jan. 2, 2020), <https://www.smithsonianmag.com/smart-news/start-2020-ushers-thousands-once-copyrighted-works-public-domain-180973887/> [<https://perma.cc/LPA8-KWPV>] (noting that works entering the public domain now were themselves based on works that had entered the public domain earlier); *Public Domain Day 2020*, *supra* note 95 (same).

half-in public domain and half-out still has not been entirely dealt with.<sup>180</sup> Although courts are well aware that copyrighted works will be streaked through with unprotectable parts, determining exactly what those unprotectable parts are is often an incredibly complex operation,<sup>181</sup> and that is before one considers splitting a composite part as small as a character into copyrighted and uncopyrighted bits.<sup>182</sup> Then, add into the mix Disney's penchant for spinning off its own properties into live-action films and musicals, all of which frequently add new layers of originality onto old layers of public domain, and copyright quickly becomes an act of archaeology. Courts have shown themselves inclined to grant Disney a wide berth with rulings that are unusually restrictive of the behavior of non-Disney parties, doubtless because of the persuasive cultural power of Disney's creative properties.<sup>183</sup> Disney further complicates matters with a number of aggressive tactics that prevent others from taking advantage of the public domain exactly as Disney did.<sup>184</sup>

We might be able to try to balance the reach of the government-sanctioned copyright monopoly granted to Disney by using antitrust law more expansively. The recent trend has been a contraction in antitrust law, with ever-larger mergers being approved into unprecedented consolidations of power.<sup>185</sup> The unpopular nature of antitrust regulations can also be illus-

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<sup>180</sup> See, e.g., *Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496 (7th Cir. 2014).

<sup>181</sup> Nothing illustrates this as clearly as the struggle the Ninth Circuit has recently been having with exactly this issue through a string of music copyright cases. See *Williams v. Gaye*, 895 F.3d 1106, 1120 (9th Cir. 2018) (deciding Robin Thicke's "Blurred Lines" infringed Marvin Gaye's copyright to "Got To Give It Up" and explaining that music cannot be broken down into five or six foundational parts but instead is "comprised of a large array of elements" and there is no magical formula for infringement to occur); see also *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Zeppelin*, 952 F.3d 1051, 1066 (9th Cir. 2020) (rejecting the inverse ratio rule the court had been applying haphazardly since 1977 and explaining that it was illogical).

<sup>182</sup> See *Klinger*, 755 F.3d at 501.

<sup>183</sup> See Jagorda, *supra* note 59, at 241-43.

<sup>184</sup> See *id.* at 242.

<sup>185</sup> See Brooks Barnes, *Disney Moves From Behemoth to Colossus With Closing of Fox Deal*, N.Y. TIMES (Mar. 20, 2019), <https://www.nytimes.com/2019/03/20/business/media/walt-disney-21st-century-fox-deal.html> [<https://perma.cc/L58X-4EFN>] (describing Disney's \$71 billion acquisition of 21st Century Fox); Cecilia Kang, *Why the AT&T-Time Warner Case Was So Closely Watched*, N.Y. TIMES, June 12, 2018, <https://www.nytimes.com/2018/06/12/business/dealbook/att-time-warner-trial-antitrust-ruling.html> [<https://perma.cc/9P48-268C>] (describing antitrust litigation aimed at AT&T's acquisition of Time Warner); Makena Kelly, *T-Mobile and Sprint Merger Approved*, VERGE (July 26, 2019), <https://www.theverge.com/2019/7/>

trated by the Department of Justice's ("DOJ") evident skepticism toward the consent decrees that have long attempted to regulate the monopolies of the copyright industry.<sup>186</sup> This re-evaluation of these regulations is happening at exactly a time when Disney has managed to amass an amount of horizontal and vertical power that should be inspiring the opposite reaction in the DOJ. While the DOJ is not wrong that the movie business has changed considerably from the early days of the twentieth century,<sup>187</sup> the industry still suffers from monopolistic tendencies that should be monitored.

The case of Redbox, a home movie rental service, against Disney regarding use of digital download codes in home movies contained an anti-trust claim. Its dismissal indicates how the narrow reading of antitrust law is not helpful against the Disney juggernaut. The court focused on Disney's market power in the home movies market, which the complaint alleged to be "a dominant position" based on the "unique strength of the Disney brand."<sup>188</sup> The court took issue with this, finding that it was a conclusory assertion: the fact that Disney had a strong brand did not necessarily translate into market power, according to the court.<sup>189</sup> While Disney's strong brand is indicative of its transcendent market power, it is true that statistics may have been of help in the complaint.

At any rate, the court moved on to examine the anticompetitive effects of Disney's actions, and here antitrust law was no more helpful. Redbox's complaint was that Disney's actions were reducing output and raising prices with regard to Disney movies.<sup>190</sup> Although the complaint did not concern Disney's "vaulting" practice, one could see a similar argument being made there, where Disney's actions lead directly to a reduction in output and an eventual increase in prices when the artificial scarcity is eased. The court, however, found that the relevant market was *all* movies, not just Disney

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26/6646158/t-mobile-sprint-merger-justice-department-approves-26-billion-fcc [https://perma.cc/Q5QM-F9MX].

<sup>186</sup> See Brent Kendall & Erich Schwartzel, *Justice Department to Terminate Long-standing Legal Rules for Movie Distribution*, WALL ST. J. (Nov. 18, 2019), <https://www.wsj.com/articles/justice-department-to-terminate-longstanding-legal-rules-for-movie-distribution-11574110393> [https://perma.cc/W2BR-7REU].

<sup>187</sup> See *id.*

<sup>188</sup> See *Redbox Automated Retail, LLC v. Buena Vista Home Ent., Inc.*, 399 F. Supp. 3d 1018, 1029 (C.D. Cal. 2019).

<sup>189</sup> See *id.* at 1027.

<sup>190</sup> See *id.*

movies.<sup>191</sup> Therefore, while Disney's actions may have harmed the market for Disney movies, the market for other movies suffered no harm.<sup>192</sup>

Of course, this result might change if Disney continues to grow into a singular source of movies. Already, Disney has around one-third of the domestic box office ticket sales before the merger with Fox; that merger will only cause its share of the pie to grow.<sup>193</sup> In addition, Disney was responsible for seven of the top eight movies of 2019.<sup>194</sup> The only exception was *Spider-Man: Far From Home*, which Disney only *co*-produced.<sup>195</sup> Disney's projected schedule expects at least one film every month for the next four years, except for April 2023, when all of us will have a breather from the onslaught.<sup>196</sup>

The *Redbox* court was not comfortable using the word "monopoly" to describe Disney, but Disney's market power allows it to limit the number of movies it makes available in order to maximize profits. Disney has every incentive to limit the number of films in the marketplace to drive audiences toward a few choice selections, all of which it owns. The loser is the viewing public, which will receive fewer and fewer pop culture choices. That will eventually lead to fewer and fewer works of creativity for the public domain to welcome a hundred years from now. And in this way, Disney can eventually shrink the public domain as well.

The European Union may have developed an alternate way of addressing some Disney issues which may prove useful in the United States. Rather than making Disney decisions in a vacuum of strictly-applied laws, a decision in Disney's attempt to trademark PINOCCHIO in Europe revealed an approach that instead acknowledges the cultural value of the public domain and the extent of Disney's attempt to co-opt it. Disney's trademark application was challenged as "tantamount to establishing an unacceptable monopoly over a component of folklore."<sup>197</sup> Although the trademark was initially granted, on appeal it was refused on the basis that the popular story had entered the culture and could not be owned by Disney for films, books, toys,

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<sup>191</sup> *See id.*

<sup>192</sup> *See id.* at 1030.

<sup>193</sup> Adam B. Vary, *Disney Explodes Box Office Records With \$11.1 Billion Worldwide for 2019*, VARIETY (Jan. 2, 2020, 1:02 PM), <https://variety.com/2020/film/box-office/disney-global-box-office-2019-1203453364/> [<https://perma.cc/RPE2-R83F>].

<sup>194</sup> *See id.*

<sup>195</sup> *See id.*

<sup>196</sup> *See id.*

<sup>197</sup> Martini Manni, *Pinocchio is a Valid Community Trademark*, LEXOLOGY (Apr. 19, 2015), <https://www.lexology.com/library/detail.aspx?g=057c7097-2f14-4e7c-a59f-4dca00958616> [<https://perma.cc/L6LU-UCMS>].

and amusement parks.<sup>198</sup> In those areas, it was concluded that PINOCCHIO was a reference to a popular folklore story that Disney could not own.<sup>199</sup> While Disney was granted a trademark to PINOCCHIO for other goods, the decision clearly limited the scope to give the public domain space. Such an approach could be a useful one. Rather than setting as a baseline that everything is owned and extracting the public domain from it, viewing Disney's intellectual property assertions from the baseline of *non*-ownership and asking what Disney has added to the unowned public domain could be a valuable way of flipping the question.

This has become a radical idea: the idea of creativity not being owned. Indeed, some commentators studying decisions involving Disney have suggested that courts seek "to safeguard the characters of the Disney menagerie because they have become such American icons."<sup>200</sup> Often, statements about the expiration of copyright feel the need to justify the public domain.<sup>201</sup> There are statements that imply that, through the law, the expiration of a copyright is an odd and regretful thing.<sup>202</sup> When the Copyright Term Extension Act was first proposed and debated, "nobody could think of a single disadvantage, or a single reason to oppose it."<sup>203</sup> Interestingly, the resistance to copyright expiration is sometimes framed as regret over the number of works that will now proliferate: *anyone* will be able to make a rap version of "Porgy and Bess."<sup>204</sup> This is presented as the tragic result of the copyright laws, instead of the actual intended objective of them at all times: the creation of more works. The expansion of creativity should be welcomed instead of viewed as suspect. The idea of the public domain as once again being the natural default is one whose return should be encouraged.

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<sup>198</sup> See Peter Lynn, *Another Reason to Hate the Mouse (or Copyright Terms: Growing Longer than Pinocchio's Nose)*, MAN VS. CLOWN BLOG, <https://manvsclown.wordpress.com/2004/08/03/another-reason-to-hate-the-mouse-or-copyright-terms-growing-longer-than-pinocchios-nose/> [https://perma.cc/GRY4-VY5F] (last visited Oct. 18, 2020).

<sup>199</sup> See Manni, *supra* note 197.

<sup>200</sup> Jagorda, *supra* note 59, at 242.

<sup>201</sup> See Italie, *supra* note 99.

<sup>202</sup> See *id.*

<sup>203</sup> Litman, *supra* note 61, at 431.

<sup>204</sup> See Dinitia Smith, *Immortal Words, Immortal Royalties? Even Mickey Mouse Joins the Fray*, N.Y. TIMES (Mar. 28, 1998), <https://www.nytimes.com/1998/03/28/arts/immortal-words-immortal-royalties-even-mickey-mouse-joins-the-fray.html> [https://perma.cc/4YWW-WL8W] (describing the Gershwin family's reluctance for Porgy and Bess to enter into the public domain for fear that it would be "debased" or turned "into rap music."); Italie, *supra* note 99.



At any rate, one effect of Disney's conduct could likely be an increase in piracy. Disney's actions result in the opposite of copyright's theoretical purpose: the promotion of progress. Any actions that complicate public access to the shared heritage of the public domain should be considered an obstacle to progress.<sup>205</sup> Disney's draconian wielding of its power may therefore ultimately encourage acts of resistance through piracy. We know that piracy decreases when the public has ready legal access to creative works and increases in response to barriers placed around that access.<sup>206</sup> As Disney seeks to cordon off more and more of the public domain, the public's determination to find ways in may increase.

## V. CONCLUSION

There is nothing wrong with using the public domain in your own commercial works. Indeed, that is the very purpose of the public domain: to encourage such ongoing use. The public domain exists to ensure that a lingering copyright monopoly doesn't stifle progress by leaving society unable to engage with the works that came before. As was widely understood for centuries of human creativity, engaging actively with works that came before you is a natural part of the process.

The danger of Disney's particular technique, though, is that it has reached into the public domain and attempted to take works out of it completely, frequently asserting ownership over characters and storylines lifted from fairy tales. This activity threatens to frustrate the efficacy of the public domain system in protecting our ability to use these works. And, given Disney's tactics, it could succeed in removing work from the public coffers forever. The government-approved monopoly contained in a copyright has, in Disney's hands, teetered close to a monopoly over all cultural creativity.

The shrinking of the public domain is not a harm that only affects the lazy and uncreative. As Disney's very success proves, the public domain is rich in meaningful stories that have resonated throughout humanity. We like to hear the stories we recognize; they carry a particular type of power difficult to replicate. When Disney re-copyrights works — taking them out

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<sup>205</sup> See Jagorda, *supra* note 59, at 250 (“[T]hese . . . characters . . . have become a part of our heritage . . .”).

<sup>206</sup> See Brian Feldman, *Piracy Is Back*, N.Y. MAG. (June 26, 2019), <https://nymag.com/intelligencer/2019/06/piracy-is-back.html> [<https://perma.cc/49EW-R3ZD>]; Brett Danaher et al., *Copyright Enforcement in the Digital Age: Empirical Evidence and Policy Implications*, 60 COMMS. OF THE ACM 68 (Feb. 2017) (“[O]ffering content in a convenient way (on a digital-subscription or ad-supported service) can convert a significant number of pirates to legal consumption.”).

of the public domain and then seeking to prevent their use by others — there is a very real toll taken on the rest of society. If copyright is about the promotion of progress, the shrinking of the public domain should make us contemplate the works that never get created. Copyright doesn't incentivize creation in a vacuum; it does so only in tandem with a rich and vibrant public domain. After all, without the public domain, we would never have had *Frozen* to begin with. Imagine your lives without "Let It Go."