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America's Broken Copyright Law: How Marvel and Sony Sparked Public Debate Surrounding the United States' "Broken" Copyright Law and How Congress Can Prevent a Copyright Small Claims Court from Making it Worse

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AMERICA’S BROKEN COPYRIGHT LAW: HOW MARVEL AND SONY SPARKED PUBLIC DEBATE SURROUNDING THE UNITED STATES’ “BROKEN” COPYRIGHT LAW AND HOW CONGRESS CAN PREVENT A COPYRIGHT SMALL CLAIMS COURT FROM MAKING IT WORSE

IZAAK HORSTEMEIER-ZRNICH*

ABSTRACT

Following failed discussions between Marvel and Sony regarding the use of Spider-Man in the Marvel Cinematic Universe, comic fans were left curious as to how Spider-Man could remain outside of the public domain after decades of the character’s existence. The comic community came to realize that Marvel was restricted in the use of its own character because of the Sonny Bono Copyright Term Extension Act of 1998 and the Supreme Court’s decision in *Eldred v. Ashcroft*. This realization sparked an online conversation regarding the United States’ lengthy copyright terms, and what many refer to as a “broken” copyright system.

The conversations regarding copyright law arose at a pertinent time. In December 2020, Congress passed the Copyright Alternative in Small-Claims Enforcement Act of 2019. Following its passage, copyright holders now have an avenue to adjudicate “small” infringement claims. While a copyright small claims court could be a useful tool for copyright owners to enforce their property rights, it could also result in liability for a large number of Americans who unknowingly infringe on copyrighted material. This Note proposes that copyright formalities, namely registration and recordation, should be reintroduced in an effort to reduce the likelihood that creators incur liability for infringement.

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I. INTRODUCTION: THE UNITED STATES’ BROKEN COPYRIGHT LAW AND HOW DISNEY SHOT ITSELF IN THE FOOT

Eleven years, three phases, and twenty-two films all led up to one of the biggest battles the world has ever seen. In 2019, Earth’s Mightiest Heroes fought to defend the universe from Thanos in Marvel Studio’s *Avengers: Endgame*.¹ To every comic fan’s delight, *Avengers: Endgame* would be the Marvel Cinematic Universe’s (“MCU”) fourth installation featuring Spider-Man.² But as Peter Parker donned the Spidey suit in preparation of fighting Thanos on the silver screen, the executives at Marvel and Sony rolled up their sleeves as they readied for a comic book custody battle for the ages.

Although many people consider Spider-Man to be the quintessential Marvel character, he has long been property of Sony Studios.³ Marvel licensed the rights to

¹ *Marvel Movies*, MARVEL, <https://www.marvel.com/movies> [<https://perma.cc/P46T-LBX3>].

² Spiderman had previously appeared in three MCU films, including: *Captain America: Civil War*, *Spider-Man: Homecoming*, and *Avengers: Infinity War*. *Id.*

³ Ryan Faughnder, *Spider-Man is Leaving the Marvel Cinematic Universe After Sony and Disney Talks Fall Apart*, L.A. TIMES (Aug. 20, 2019), <https://www.latimes.com/entertainment-arts/business/story/2019-08-20/spider-man-is-leaving-the-marvel-cinematic-universe-after->

Spider-Man to Sony in 1999, nearly a decade before Marvel began producing MCU films through Marvel Entertainment in the mid-2000s.⁴ In 2009, Disney bought Marvel Entertainment.⁵ After the purchase, Disney had access to a plethora of Marvel-branded superheroes.⁶ Spider-Man, however, still belonged to Sony.

Following two fairly successful iterations of the character,⁷ Sony decided to team up with Disney's Marvel Studios as it moved to reboot the Spider-Man franchise for a third time.⁸ The 2015 deal allowed for Spider-Man to be shared by Sony and Marvel productions across five films.⁹ Following *Spider-Man: Far from Home*, the fifth of

sony-and-disney-talks-fall-apart [https://perma.cc/2FNB-ZL7A] (noting that Sony first acquired the rights to Spider-Man in 1999).

⁴ Adam Chitwood, *Marvel and Sony 'Spider-Man' Rights Explained: What's MCU and What's Not?*, COLLIDER (July 3, 2017), <https://collider.com/spider-man-marvel-sony-deal-explained/> [https://perma.cc/6RMK-QXCM].

⁵ Faughnder, *supra* note 3.

⁶ Many were surprised when the Walt Disney Company acquired Marvel Entertainment for just over \$4 billion in 2009. With the acquisition of Marvel, Disney acquired the comic book publisher and movie studio's library of 5,000 characters—including some of the world's best-known superheroes, including: Captain America, Thor, Iron Man, and the Hulk. Brooks Barnes & Michael Cieply, *Disney Swoops into Action, Buying Marvel for \$4 Billion*, N.Y. TIMES (Aug. 31, 2009), <https://www.nytimes.com/2009/09/01/business/media/01disney.html> [https://perma.cc/VPZ6-HACG].

⁷ Sam Raimi's *Spider-Man* (2002) played a massive role in the explosion of superhero movies in the early 2000s. The Raimi films featured Tobey Maguire as Spider-Man and a supporting cast that included Kirsten Dunst, Willem Dafoe, and James Franco. The 2004 sequel featuring Alfred Molina's Doctor Octopus is considered by many to be one of the best superhero movies ever made. However, the third film of the franchise was received poorly, and after production on a fourth film fell through, Sony opted to reboot. The reboot would feature Andrew Garfield playing a suave and charismatic version of Peter Parker in *The Amazing Spider-Man* (2012). Director Marc Webb took the reboot and Peter Parker's story right back to its origin—showcasing the radioactive spider bite, Uncle Ben's murder, and all the other plot points that fans have seen one-too-many times. *The Amazing Spider-Man 2* would premier several years later and would ultimately be the final chapter in Webb and Garfield's relatively short-lived version of the friendly neighborhood web-slinger. Compared to the original trilogy featuring Maguire, the rebooted Amazing Spider-Man series was making less money and was far less popular with fans and critics. Ultimately, Maguire's Spidey films averaged about \$100 million more (per film) at the Worldwide Box Office than Garfield's films. Craig Elvy, *What Went Wrong with Sony's Amazing Spider-Man Movies*, SCREEN RANT (Jan. 29, 2020), <https://screenrant.com/amazing-spider-man-movies-sony-movies-bad-reason/> [https://perma.cc/W8J4-FKH6]; see also *Box Office History for Spider-Man Movies*, THE NUMBERS, <https://www.the-numbers.com/movies/franchise/Spider-Man#tab=summary> [https://perma.cc/W2C4-RVRS].

⁸ Donovan Russo, *Sony Has Big Plans for Spider-Man Cinematic Universe, but a Key Hero Is Unavailable: Spidey*, CNBC (Mar. 24, 2019), <https://www.cnbc.com/2019/03/24/sonys-plan-for-spider-man-cinematic-universe-lacks-a-hero-spidey.html> [https://perma.cc/RGG9-A7SG].

⁹ *Id.*

such movies, the two powerhouse studios entered into renegotiations.¹⁰ It was reported that Sony was unwilling to give in to Marvel's requested 50% co-financing stake in future Spider-Man films.¹¹ With the deal and negotiations dead in the water, hashtags such as "#SaveSpiderMan" started to trend on social media.¹²

Panic from fans would soon be subdued as Tom Holland, Spider-Man actor and real-life hero, convinced Disney CEO Bob Iger to find a way to make the deal work.¹³ Following his conversation with Holland, Iger called his team at Disney Studios and then called the head of Sony in an attempt to salvage a deal.¹⁴ In September of 2019, the two studios announced that a third film in the "Spider-Man: Homecoming" series would be scheduled for release on July 16, 2021.¹⁵ Spidey will also appear in another Marvel-made entry, similar to his multiple Avengers appearances.¹⁶

Before the deal was announced, many fans were quick to place blame for the failed negotiations on either Sony or Disney, but as they continued to look into the issue, many came to the realization that the real enemy was actually the United States' "broken copyright law."¹⁷ In 1998, the Sonny Bono Copyright Term Extension Act

¹⁰ Mike Fleming Jr., *Disney-Sony Standoff Ends Marvel Studios & Kevin Feige's Involvement in 'Spider-Man,'* DEADLINE (Aug. 20, 2019), <https://deadline.com/2019/08/kevin-feige-spider-man-franchise-exit-disney-sony-dispute-avengers-endgame-captain-america-winter-soldier-tom-rothman-bob-iger-1202672545/> [<https://perma.cc/6YWK-85K8>].

¹¹ *Id.*

¹² Chatterjee Primit, *Save Spider-Man: The Internet Riots After Tom Holland's Exit from Marvel Due to Disagreement Between Sony and Disney*, MASHABLE INDIA (Sept. 2019), <https://in.mashable.com/entertainment/5971/save-spider-man-the-internet-riots-after-tom-hollands-exit-from-marvel-due-to-disagreement-between-s> [<https://perma.cc/G7LS-58XH>].

¹³ Specifically, Tom Holland drunkenly spoke to Bob Iger on the phone and pleaded with him, through tears, to do whatever he could to keep his version of Spider-Man in the Marvel Cinematic Universe. The call helped convince Iger to get back in touch with Sony. It was clear to Iger how much Holland cared about the role and how much the fans wanted the Holland Spider-Man to appear in more movies. Hannah Yasharoff, *Tom Holland Cried to Keep Spider-Man in Marvel Movies, Disney CEO Bob Iger Jokes*, USA TODAY (Oct. 6, 2019), <https://www.usatoday.com/story/entertainment/movies/2019/10/06/tom-holland-helped-keep-spider-man-in-marvel-movies/3890557002/> [<https://perma.cc/A33G-VD65>]; see also James Grebey, *Tom Holland Was a Little Drunk When He Helped Save Spider-Man and the MCU*, GQ (Dec. 5, 2019), <https://www.gq.com/story/tom-holland-was-a-little-drunk-when-he-helped-save-spider-man-and-the-mcu> [<https://perma.cc/W25U-JAA3>].

¹⁴ Leah Asmelash, *Tom Holland Called the CEO of Disney and Told Him to Save Spider-Man*, CNN (Oct. 5, 2019), <https://www.cnn.com/2019/10/05/entertainment/tom-holland-spider-man-bob-iger-jimmy-kimmel-trnd/index.html> [<https://perma.cc/68ZU-YAVU>].

¹⁵ Sarah M. Moniuszko, *Spider-Man to Stay in Marvel Cinematic Universe for Another Film, Tom Holland and Zendaya React*, USA TODAY (Sept. 27, 2019), <https://www.usatoday.com/story/entertainment/movies/2019/09/27/spider-man-marvel-cinematic-universe-sony-deal/3786803002/> [<https://perma.cc/KYZ3-9JAF>].

¹⁶ *Id.*

¹⁷ In the fall of 2019, Reddit user u/NealKenneth made a post in the subreddit r/Movies alleging that the real villain in the Marvel/Sony dispute was America's "broken copyright law."

(“CTEA”) retroactively extended everything created between 1923 and 1977 to a ninety-five-year copyright term.¹⁸ If not for the passing of the CTEA, Spider-Man would have entered the public domain in January of 2019.¹⁹ The passage of the CTEA came as a direct result of Disney’s lobbying efforts.²⁰ Therefore, in a beautiful display of irony, if not for the CTEA and Disney’s push to get the Act passed, Spider-Man would have entered the public domain and Marvel and Disney would have been free to use the web-slinging character without restriction.

The negotiations between Disney and Sony over the use of Spider-Man has helped to reinvigorate a public debate surrounding U.S. copyright law and its deficiencies.²¹ This Note posits that although the CTEA is constitutional and was correctly decided as so by the Supreme Court in *Eldred v. Ashcroft*,²² it created a copyright system that makes it extremely difficult for users to determine whether a work is copyrighted and who owns it. With the recent creation of a copyright small claims court, Congress should create a solution that would help to prevent the public from unknowingly infringing on copyrights and being subject to future small claims decisions.

Part II of this Note provides a brief historical background of United States copyright law. Part III examines the Supreme Court’s decision to uphold the CTEA as constitutional in *Eldred v. Ashcroft* and the effects of that decision. Part IV examines the Copyright Alternative in Small-Claims Enforcement Act of 2019 (“The CASE Act”) and argues that the CASE Act could place a large number of Americans who unknowingly infringe on copyright at risk of unjust penalties. This Note concludes that federal copyright law would be best served if Congress adopted policy requiring the formal registration of copyrights and created a modern database where users could easily access that copyright formation.

The post quickly became one of the most popular in the subreddit for a short period of time. It amassed over 33 thousand user-generated “upvotes” and over two thousand comments. u/NealKenneth, *Everyone Choosing Sides in the Disney/SONY Debate Doesn't Recognize the Real Enemy Here: OUR BROKEN COPYRIGHT LAW*, REDDIT (Aug. 29, 2019), https://www.reddit.com/r/movies/comments/cwu9ny/everyone_choosing_sides_in_the_disney_sony_debate/ [<https://perma.cc/8ST7-GQ37>].

¹⁸ Sonny Bono Copyright Term Extension Act §§ 102(b)(3)(A), 102(b)(4)(A), 17 U.S.C. §§ 302(c), 302(e).

¹⁹ Thomas Bacon, *Disney's 1990s Lobbying Cost Them Spider-Man in the MCU*, SCREEN RANT (Aug. 25, 2019), <https://screenrant.com/spiderman-copyright-mcu-disney-lobbying-fault/> [<https://perma.cc/SHW4-5YJU>].

²⁰ *Id.*

²¹ u/NealKenneth, *supra* note 17.

²² *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

II. BACKGROUND: A BRIEF HISTORY OF COPYRIGHT LAW IN THE UNITED STATES

A. *Copyright Law Pre-1998*

The power to grant copyrights is explicitly granted to Congress in Article I, section 8, clause 8 of the U.S. Constitution.²³ Clause 8 states gives Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁴ The first Congress wasted little time before implementing the copyright provision of the Constitution by passing the Copyright Act of 1790.²⁵ Under that Act, a term for a copyrighted work was set at fourteen years with the option to renew for an additional fourteen.²⁶ The modest twenty-eight year copyright term granted under the original Copyright Act has been extended numerous times over the past 230 years.

In 1831, Congress lengthened the term of copyrighted works to twenty-eight years with the possibility of a fourteen-year extension.²⁷ The extension applied to future works and those current works whose copyright had not expired.²⁸ Copyright terms were again extended in 1909 when congress lengthened the terms to twenty-eight years with a possible renewal of twenty-eight.²⁹ In 1976, Congress preempted previous copyright law and set copyright terms to the life of the author plus 50 years.³⁰ The 1976 Act also provided that if a work remained under copyright at the beginning of 1978, the twenty-eight-year renewal term called for by the 1909 Act would instead be a forty-seven-year renewal term.³¹ The 1976 Revision of the U.S. Copyright Act was not the first time Congress retroactively extended the terms of pre-existing copyrights and it would not be the last.

²³ U.S. CONST. art. I, § 8, cl. 8.

²⁴ *Id.*

²⁵ *Copyright Timeline: A History of Copyright in the United States*, ASS’N OF RSCH. LIBRS., <https://www.arl.org/copyright-timeline/> [<https://perma.cc/X8B2-QSZZ>].

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Copyright Duration, Renewal and Termination – Module 4 of 5*, L. SHELF, <https://lawshelf.com/videocourses/moduleview/copyright-duration-renewal-and-termination/> [<https://perma.cc/63QD-BWMF>].

B. *The Sonny Bono Copyright Term Extension Act of 1998, or "The Mickey Mouse Protection Act"*

In 1998, Congress passed the CTEA,³² which represented the eleventh time in forty years that Congress extended the terms of existing copyrights.³³ The Act extended the copyright term to the life of the author plus seventy years and applied to works under copyright at the time it was passed.³⁴ This meant that a copyrighted work created after 1923, i.e. a cartoon mouse, received extensions from both the 1976 Act and the 1998 Act. A copyright that was originally meant to last for up to 56 years could then last up to 95 years from the year of first publication, or 120 years from the year of creation, whichever expired first.³⁵

Before the CTEA, *Steamboat Willie*, the cartoon in which Mickey Mouse made his debut, was set to enter the public domain in 2003.³⁶ Fortunately for Disney, the CTEA extended the copyright for *Steamboat Willie* through 2023.³⁷ The timing of the 1998 Act was no accident. Disney lobbied extensively for the Act to prevent Mickey from entering the public domain.³⁸

Congressional proponents of the bill cited three primary justifications for the Act:

- (1) [T]he need to conform the U.S. copyright term with the prevailing worldwide standard; (2) the insufficiency of the U.S. copyright term to provide a fair economic return for authors and their dependents; and, (3) the failure of the U.S. copyright term to keep pace with the substantially increased commercial life of copyrighted works.³⁹

Congressional opponents of the extension argued "that the statute would not encourage creativity and that the other supposed goals were neither achieved by the proposed statute nor would benefit the public in the constitutionally required way of 'promoting the Progress of Science.'"⁴⁰ The Act passed without much public

³² *Id.*

³³ LAWRENCE LESSIG, FREE CULTURE 214 (2004).

³⁴ 17 U.S.C. § 302(a).

³⁵ *Id.* § 302(c).

³⁶ Jacob Douglas, *Free (Steamboat) Willie: How Walt Disney's Original Mouse Could Be Entering the Public Domain*, FLATLAND (Jan. 14, 2021), <https://www.flatlandkc.org/arts-culture/free-steamboat-willie-how-walt-disneys-original-mouse-could-be-entering-the-public-domain/> [https://perma.cc/BZ5X-FU75].

³⁷ Timothy B. Lee, *Mickey Mouse Will Be Public Domain Soon—Here's What That Means*, ARS TECHNICA (Jan. 1, 2019), <https://arstechnica.com/tech-policy/2019/01/a-whole-years-worth-of-works-just-fell-into-the-public-domain/> [https://perma.cc/C4XW-UK2P].

³⁸ LESSIG, *supra* note 33, at 218 ("Disney is estimated to have contributed more than \$800,000 to [congressional] reelection campaigns in the 1998 cycle.").

³⁹ 144 CONG. REC. 25,688 (1998) (statement of Sen. Orrin Hatch).

⁴⁰ Dennis S. Karjala, *Judicial Review of Copyright Term Extension Legislation*, 36 LOY. L.A. L. REV. 199, 200 (2002).

opposition despite being a result of what Lawrence Lessig describes as the “perpetual motion machine.”⁴¹ Despite the loss, opponents of the CTEA would eventually get their day in court.

III. ERIC ELDRED, THE *ELDRED* DECISION, AND THE CURRENT STATE OF COPYRIGHT LAW

Eric Eldred, a New Hampshire resident, felt the impact of the CTEA immediately. In 1995, Eldred began a hobby of electronically scanning public domain works and making them available for free in his library on the internet.⁴² He had looked forward to adding Robert Frost’s collection of poems, *New Hampshire*, to his library when it entered the public domain in 1998.⁴³ Unfortunately for Eldred, the CTEA kept the collection, which was one of his favorites because he lived in New Hampshire, from entering the public domain and prevented him from adding it to his library.⁴⁴ In January 1999, Eldred filed suit in federal district court in Washington, D.C., asking the court to declare the Sonny Bono Copyright Term Extension Act unconstitutional.⁴⁵

Eldred’s two central claims were that (1) extending existing copyright terms violated the Constitution’s “limited Times” requirement, and (2) extending terms by another twenty years violated the First Amendment.⁴⁶ The claim was dismissed by both the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit.⁴⁷ In February 2002, to the surprise of everyone following the case, the Supreme Court granted Eldred’s petition to review the D.C. Circuit’s opinion.⁴⁸ Oral argument was scheduled for the first week of October 2003.⁴⁹

On the night before oral argument, people lined up outside of the Supreme Court steps in hopes of obtaining a seat inside.⁵⁰ The legal battle against copyright term extensions had obtained the public support that had been absent from the legislative battle. On January 15, 2003, the Supreme Court returned its opinion.⁵¹ Despite the

⁴¹ LESSIG, *supra* note 33, at 218 (“So long as legislation can be bought (albeit indirectly), there will be all the incentive in the world to buy further extensions of copyright.”).

⁴² *Id.* at 213.

⁴³ *Id.* at 214.

⁴⁴ *Id.*

⁴⁵ *Id.* at 228.

⁴⁶ *Id.*

⁴⁷ *Eldred v. Ashcroft*, 537 U.S. 186, 196–97 (2003).

⁴⁸ LESSIG, *supra* note 33, at 229.

⁴⁹ *Id.* at 236.

⁵⁰ *Id.* at 237–38.

⁵¹ *Id.* at 241.

growth in support against the CTEA, the Court had affirmed the decision of the D.C. Circuit Court in a 7-2 decision penned by Justice Ginsburg.⁵²

A. *The Eldred Decision*

In her majority opinion, Justice Ginsburg begins by diving into the congressional history regarding copyright enactments.⁵³ She notes how multiple copyright acts, including those from 1790, 1831, 1909, and 1976 all applied not only to future works, but also to those works that existed at the time that the acts became effective.⁵⁴ Justice Ginsburg states that the CTEA parallels the 1976 Act by applying new terms to all works not published by January 1, 1978.⁵⁵ She further explains that in retroactively applying the CTEA, Congress is doing exactly what it has always done, as evidenced by the 1831, 1909, and 1976 Acts.⁵⁶ Having established Congressional precedent as a backdrop, and after providing a quick summary of the decisions and reasoning of the lower courts, Justice Ginsburg moved on to address Eldred's first argument.

Eric Eldred and his counsel conceded that the CTEA's baseline term of life plus 70 years, qualified as a "limited Time" as applied to future copyrights.⁵⁷ However, they argued that the existing copyrights that were extended to endure for that same term were not "limited" as required by the Copyright and Patent Clause of the Constitution.⁵⁸ In describing Eldred's position, the Court stated that their "argument essentially reads into the text of the Copyright Clause the command that a time prescription, once set, becomes forever 'fixed' or 'inalterable.'"⁵⁹ The Court rejected this argument because the word "limited," according to the majority, "does not convey a meaning so constricted."⁶⁰ The Court instead held that the word means "confined within certain bounds," "restrained," or "circumscribed," and that it had the same meaning at the time when the framers adopted it.⁶¹ With this definition, the Court reasoned that a time span appropriately "limited" as applied to future copyrights does not automatically cease to be "limited" when applied to existing copyrights.⁶²

⁵² *Eldred*, 537 U.S. at 193, 222.

⁵³ *Id.* at 194-95.

⁵⁴ *Id.*

⁵⁵ *Id.* at 196.

⁵⁶ *Id.*

⁵⁷ *Id.* at 199.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

Accordingly, the Court held that there was “no cause to suspect that a purpose to evade the ‘limited Times’ prescription prompted Congress to adopt the CTEA.”⁶³

The majority opinion then revisited the historical analysis that it began to perform earlier in the opinion. It restated, more clearly, that “[h]istory reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime.”⁶⁴ Justice Ginsburg bolstered the opinion by looking to congressional practice with respect to patents. Because the clause empowering Congress to confer copyrights also authorizes patents, the Court considered it significant that early Congresses extended the duration of numerous individual patents as well as copyrights.⁶⁵ Although *Eldred* was the first occasion in which the Court had to decide whether extending the duration of existing copyrights complies with the “limited Times” prescription, the Court had previously found no constitutional barrier to the legislative expansion of existing patents in *McClurg v. Kingsland*.⁶⁶ *McClurg* upheld retroactive application of new patent terms, and “the Court explained that the legal regime governing a particular patent ‘depends on the law as it stood at the emanation of the patent, together with such changes as have been since made; for though they may be retrospective in their operation, that is not a sound objection to their validity.’”⁶⁷

The Court was convinced that its historical analysis clearly showed that Congress had a consistent practice of applying newly enacted copyright terms to future and existing copyrights.⁶⁸ The CTEA was merely one act in a long string of acts that followed this historical practice by keeping the duration provisions of the previous act largely in place and simply adding an additional term to each of them.⁶⁹ Guided by text, history, and precedent, the Court disagreed with Eldred’s submission that extending the duration of existing copyrights was beyond Congress’s authority under the Copyright Clause.⁷⁰

Satisfied that the CTEA complied with the “limited Times” prescription, the Court then turned to whether the twenty-year extension was a rational exercise of the legislative authority conferred by the Copyright Clause.⁷¹ On that point, the Court deferred substantially to Congress.⁷² The Court held that the CTEA reflected

⁶³ *Id.* at 199–200.

⁶⁴ *Id.* at 200.

⁶⁵ *Id.* at 201.

⁶⁶ *Id.* at 202–03.

⁶⁷ *Id.* at 203.

⁶⁸ *Id.* at 204.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

judgments of a kind that Congress typically makes and that in enacting the CTEA, Congress assessed international, demographic, economic, and technological concerns.⁷³ Because the Court found the CTEA to be a rational enactment, and because it found that the CTEA did not create a regime of perpetual copyrights, the Court was not at liberty to second guess the determinations and policy judgments of Congress.⁷⁴

Satisfied that the Copyright Clause presented no impediment to the CTEA's extension of copyright terms, the Court moved on to Eldred's second contention—that extending terms by another twenty years violated the First Amendment. The Court rejected this claim in fewer words than Eldred's first. In rejecting this contention, the Court considered the proximity in time in which the Copyright Clause and the First Amendment were adopted.⁷⁵ The fact that they were adopted so close in time “indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles.”⁷⁶ The Court also reasoned that copyright law contains built-in First Amendment accommodations, such as distinguishing between ideas and expression and allowing only the latter to be eligible for copyright protection, and providing the “fair use” defense.⁷⁷ The Court noted that the CTEA itself specifically supplemented the two traditional First Amendment safeguards.⁷⁸

The Court ultimately rejected both of the petitioners' contentions because their vision would do more than render the CTEA's duration extensions unconstitutional as to existing works—it would have made “the CTEA's enlarged terms invalid even as to future work.”⁷⁹ Such a holding would have opened the door to claims that the 1976 Act's time extensions, which set the pattern that the CTEA followed, were invalid as well.⁸⁰

⁷³ *Id.* at 205–06.

⁷⁴ *Id.* at 208–09.

⁷⁵ *Id.* at 219.

⁷⁶ *Id.*

⁷⁷ The Court explained the defense as follows:

[T]he [fair use] defense provides: “The fair use of a copyrighted work, including such use by reproduction in copies . . . , for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” The fair use defense affords considerable “latitude for scholarship and comment,” and even for parody.

Id. at 219–20 (citations omitted) (first quoting 17 U.S.C. § 107; and then quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985)).

⁷⁸ *Id.* at 220.

⁷⁹ *Id.* at 221–22.

⁸⁰ *Id.* at 222.

B. Copyright Law in the Wake of Eldred

In its majority opinion in *Eldred*, the Court signaled that its hands were tied on the issue. Justice Ginsburg wrote that the Court was not at liberty to second guess a congressional determination to enact the CTEA, no matter how “debatable or arguably unwise [the CTEA] may be,”⁸¹ and at the time there was plenty of evidence that such an enactment would be unwise.

As a result of the *Eldred* decision, the United States now has a copyright system where copyright terms last for an extremely long amount of time. The system also requires no formality, which makes it hard to locate copyright owners to ask permission to use or license their work.⁸² The length of the protection terms and the lack of copyright formality make the system very unfriendly for people who want to license content or use public domain material. Without the proper precautions, the copyright system may become even more hostile now that the Copyright Alternative in Small-Claims Enforcement Act has been passed into law.

IV. THE CASE ACT AND THE CONSEQUENCES OF A COPYRIGHT SMALL CLAIMS COURT

In December 2020, Congress passed the Copyright Alternative in Small-Claims Enforcement Act (“The CASE Act”) into law.⁸³ This legislation has the potential to expose a large number of Americans to copyright lawsuits. The CASE Act creates a copyright small claims court that will allow copyright holders to pursue small copyright infringement claims.⁸⁴ The goal of the CASE Act is to create a process whereby copyright owners can protect their works without incurring significant costs. While such an alternative process will benefit the many copyright holders that cannot afford to bring their claims in federal courts, it will make the copyright system more unfriendly for those who want to license and use content.

A. The Problem with Bringing Smaller Copyright Claims and the Copyright Office’s Recommended Solution

In 2006, Congress recognized the problems surrounding small copyright claims.⁸⁵ The vast majority of copyright infringements are small in scale, but copyrights are governed by federal law and must be brought in federal court.⁸⁶ The cost of litigating the claim in federal court often outweighs the value that could be obtained in bringing

⁸¹ *Id.* at 208.

⁸² LESSIG, *supra* note 33, at 249.

⁸³ *Congress Passes CASE Act of 2020 and Law Regarding Unauthorized Streaming Services*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/newsnet/2020/866.html> [<https://perma.cc/7TKC-WGHS>].

⁸⁴ *Id.*

⁸⁵ U.S. COPYRIGHT OFF., *COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS 5* (2013) (stating that Congress identified the problem of small copyright claims in 2006 as an outgrowth of its consideration of orphan works).

⁸⁶ 17 U.S.C. § 301.

the claim.⁸⁷ As a result, “the current system deters authors from asserting their rights, renders these cases difficult for any attorney to take on, and encourages copyright infringement by all phases of society.”⁸⁸ While these infringements seem minor to most, they could have a substantial effect on the artists and creators that hold them when taken in the aggregate.⁸⁹

It became clear to Congress that claims for copyright infringement involving lesser amounts of damages could not be pursued within the federal court structure, at least not practically.⁹⁰ The House of Representatives’ Subcommittee on Courts, the Internet, and Intellectual Property had its first hearing on the question of small copyright claims in March of 2006.⁹¹ Five years later, the question of small copyright claims reemerged when the House Judiciary Committee requested that the Copyright Office conduct a study to evaluate the issue.⁹² Following the study, the Copyright Office published a report reflecting their findings and gave recommendations and even proposed legislation regarding the establishment of a copyright small claims court.⁹³

B. *What is the CASE Act?*

All the Copyright Office’s research and recommendations have led Congress to draft their own bills that seek to create a small claims court. The recently passed CASE Act is 2019 legislation that proposed the creation of a voluntary small claims board within the U.S. Copyright Office.⁹⁴ It creates a new board called the Copyright Claims Board, which would allow recovery in each case of up to \$30,000 in damages total, with a cap of \$15,000 in statutory damages per work infringed.⁹⁵ The system is

⁸⁷ The federal court filing and administrative fees alone can cost up to \$400. *See* 28 U.S.C. § 1914 (providing for \$350 filing fee); *District Court Miscellaneous Fee Schedule*, U.S. Cts. (Dec. 1, 2020), <https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule> [<https://perma.cc/Y4AQ-4BBG>] (providing \$52 administrative fee to be charged by district court for filing of civil action).

⁸⁸ Am. Photographic Artists, Comment Letter on Notice of Inquiry Regarding Remedies for Small Copyright Claims 3 (Jan. 17, 2012), https://www.copyright.gov/docs/smallclaims/comments/05_american_photographic_artists.pdf [<https://perma.cc/5Q5V-KCFR>].

⁸⁹ Songwriters Guild of Am. & Nashville Songwriters Ass’n Int’l, Comment Letter on Notice of Inquiry Regarding Remedies for Small Copyright Claims 1 (Jan. 17, 2012), https://www.copyright.gov/docs/smallclaims/comments/51_songwriters_guild.pdf [<https://perma.cc/A5XS-F6XF>].

⁹⁰ U.S. COPYRIGHT OFF., *supra* note 85, at 5.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Copyright Alternative in Small-Claims Enforcement Act of 2019, H.R. 2426, 116th Cong. (2019) (codified at 17 U.S.C. §§ 1501–11).

⁹⁵ 17 U.S.C. §§ 1504(e)(1)(A), 1504(e)(1)(D).

voluntary, allowing defendants to opt out of the process.⁹⁶ Cases are heard by three copyright claims officers, who are appointed by the Librarian of Congress after consultation with the Register of Copyrights.⁹⁷ The CASE Act passed the House in a landslide vote of 410–6.⁹⁸ It eventually made its way through the senate and was signed into law on December 27, 2020.⁹⁹

C. *Small Claims Consequences*

The passage of the CASE Act means trouble to the large amount of people that commit copyright infringement. Frequent copyright violations are a natural consequence of a copyright system that automatically gives copyrights, regardless of whether or not the owner complies with a formality, and then allows those copyrights to exist for over a century. It's unfortunate that the current copyright system deters copyright holders from asserting their rights, but a copyright small claims court brings more harm than good if constructed improperly.

The CTEA has made it extremely difficult to identify works that are copyrighted. Lawrence Lessig illustrated this situation best in his book *Free Culture*.¹⁰⁰ He states that 10,047 books were published 1930 and that in 2000, one hundred seventy-four of those books were still in print.¹⁰¹ He asks the reader to imagine that they run an internet archive (“iArchive”), and that they want to make the remaining 9,873 available to the world through their iArchive project.¹⁰² In order to do so, one has to determine which of the almost 10,000 books are still under copyright.¹⁰³ That requires going to a library because the data is not online, paging through the books, and cross-checking the titles and authors of the books with the copyright registration and renewal records for works

⁹⁶ *Id.* § 1504(a). If the defendant opts out of the small claims process, the plaintiff still has the ability to bring the infringement claim in a federal court. *Id.* However, there is a very good chance that the average copyright infringer will be unaware of the opt-out provision in CASE.

⁹⁷ *Id.* § 1502(b)(1).

⁹⁸ 165 CONG. REC. H8370–71 (daily ed. Oct. 22, 2019). In February 2020, the CASE Act was just one of 395 House bills that were sitting in the Senate. Former Senate Majority Leader Mitch McConnell indicated that there was a very slim chance that any of those bills would be passed. House Speaker Nancy Pelosi stated that the bills were sitting in a “legislative graveyard.” James Crowley, ‘Grim Reaper’ Mitch McConnell Admits There Are 395 House Bills Sitting in the Senate: ‘We’re Not Going To Pass Those,’ NEWSWEEK (Feb. 14, 2020, 12:14 PM), <https://www.newsweek.com/mitch-mcconnell-grim-reaper-395-house-bills-senate-wont-pass-1487401> [<https://perma.cc/6NY7-BWQG>].

⁹⁹ Terrica Carrington & Keith Kupferschmid, *CASE Act Signed into Law: What This Means*, COPYRIGHT ALL. (Jan. 27, 2021), <https://copyrightalliance.org/case-act-signed-into-law/> [<https://perma.cc/8YUU-5CGC>].

¹⁰⁰ LESSIG, *supra* note 33, at 221–22.

¹⁰¹ *Id.* at 222.

¹⁰² *Id.*

¹⁰³ *Id.*

published in 1930.¹⁰⁴ That research and cross-referencing would result in a list of still-copyrighted books.¹⁰⁵ This is a nearly insurmountable task for someone who wishes to extend the creative life of a work that appears to have been forgotten by society.

Now imagine that the iArchive operator takes a risk and adds the books to their archives without performing their due diligence, or that they went through the hassle of cross-checking the books and a few copyrighted materials still slipped into the archive. Under the former system, the owner of the copyrighted book would likely abstain from bringing an infringement claim because the cost of doing so in federal court would make it unreasonable. However, with the creation of a copyright small claims court, the owner will have more of an incentive to bring a claim of infringement. If taken to the copyright small claims court, the iArchive operator could be liable for thousands of dollars in damages for trying to digitize books that they thought, or assumed, were in the public domain.

Copyright holders should be able to enforce their copyrights regardless of the copyright's worth. After all, a copyright is a form of property and the owner deserves the rights afforded to that property. However, action from Congress is required to prevent a copyright small claims court from making the above illustrated situation a reality.

If the iArchive illustration presented by Lawrence Lessig seems too remote or unique, let us consider the effects that a copyright small claims court could have on a more "modern" medium—YouTube.

YouTube is the largest video hosting site on the internet and thousands of entrepreneurs have been able to make very lucrative careers out of producing videos and posting them to the site.¹⁰⁶ Over the past decade, these "content creators" have been very vocal about the effects that copyright law has had on their ability to create and promulgate new content for their fans.¹⁰⁷ For the first time in nearly a decade, YouTube overhauled its community guidelines in 2019 to implement a new system

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Ryan Cooper, *Copyright Laws Are Breaking Youtube. Here's How to Fix the Problem*, THE WEEK (Mar. 7, 2016), <https://theweek.com/articles/608700/copyright-laws-are-breaking-youtube-heres-how-fix-problem> [<https://perma.cc/58AX-HKQV>].

¹⁰⁷ In 2017, Ethan and Hila Klein of the popular H3H3 YouTube channel won a summary judgment in a legal battle that ensued after they posted a reaction video mocking another YouTuber, Matt Hoss, by featuring clips of one of Hoss's videos in their criticism. The Klein's defended their use of Hoss's footage as fair use. Judge Katherine B. Forrest ruled that it constituted fair use as a matter of law because "[a]ny review of the Klein video leaves no doubt that it constitutes critical commentary of the Hoss video; [and] there is also no doubt that the Klein video is decidedly not a market substitute for the Hoss video." Following the decision, Ethan Klein tweeted that it was a "[h]uge victory for fair use on YouTube." However, the Court refused to hold that all 'reaction videos' constituted fair use. Anthony Ha, *Judge Sides with Youtubers Ethan and Hila Klein in Copyright Lawsuit*, TECH CRUNCH (Aug. 23, 2017, 6:50 PM), <https://techcrunch.com/2017/08/23/judge-sides-with-youtubers-ethan-and-hila-klein-in-copyright-lawsuit/> [<https://perma.cc/5DVF-QEPB>].

for warning channels that break its copyright rules.¹⁰⁸ That policy dictates that copyright holders can send YouTube legal requests whenever they believe that a content creator is illegally infringing on their copyright.¹⁰⁹ At first, the infringer will receive a warning “strike.”¹¹⁰ The next strike will freeze the infringer’s channel for one week.¹¹¹ That strike will expire after 90 days. If the user is found to have infringed on a copyright again within that 90-day period, it will result in a two-week uploading freeze.¹¹² If another strike is received in that 90-day period, YouTube will shut the channel down.¹¹³

This policy poses a concern for some of the YouTube community considering the fact that many YouTubers lack the ability to determine what does and does not constitute fair use under copyright law.¹¹⁴ Many YouTubers use the platform to either supplement their income or generate it entirely.¹¹⁵ For the YouTubers that rely on the platform for a living, the possibility that their accounts could become suspended or even shut down is particularly alarming. Now consider the ramifications following the passage of the CASE Act. A YouTuber could not only have their account suspended and pulled from the platform, but they could also find themselves liable for damages for the copyright infringement that resulted in the adverse effects on their channel. Considering that the YouTube strike system is already subject to copyright abuse,

¹⁰⁸ Chaim Gartenberg, *YouTube Updates Channel Strike System with One-Time Warning and More Consistent Punishments*, THE VERGE (Feb. 19, 2019), <https://www.theverge.com/2019/2/19/18231382/youtube-strike-system-warning-punishment-community-guidelines> [<https://perma.cc/7VRH-GVAA>].

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ In an attempt to educate its users on fair use, YouTube published a five-minute video titled “Fair Use—Copyright on YouTube,” where it attempts to lay out the basic principles of the doctrine for the viewer. As of May 17, 2021, the video has only amassed 738,518 views since being published on October 8, 2019, despite the channel having over 3.65 million subscribers. For a peek into the frustrations that users have experienced regarding fair use, copyrights, and strikes on the platform, look to the comment section of the video. But be warned, a YouTube video comment section is quite often not for the faint of heart. *Fair Use—Copyright on YouTube*, YOUTUBE (Oct. 8, 2019), <https://www.youtube.com/watch?v=1PvjRlkwI18>.

¹¹⁵ In 2018, Forbes reported that the highest-earning YouTuber, DanTDM, brought in \$16.5 million on the year. However, YouTube channels that bring in at least 1 million views a month still might only generate between \$12,000 to \$16,000 a year in advertising revenue. Todd C. Frankel, *Why Almost No One is Making a Living on YouTube*, WASH. POST (Mar. 2, 2018, 12:12 PM), <https://www.washingtonpost.com/news/the-switch/wp/2018/03/02/why-almost-no-one-is-making-a-living-on-youtube/> [<https://perma.cc/8RVH-QPV6>].

YouTube content creators could face a real risk of not only real claims, but also frivolous claims.¹¹⁶

Whether the victims are iArchive operators struggling to determine whether a book is still under copyright or YouTubers struggling to determine whether their use of footage or music is fair use, many unsuspecting people could find themselves subject to liability following the creation of a small claims court. However, if Congress were to reintroduce some copyright formalities, it would have the effect of counteracting at least some of those negative consequences.

V. CONGRESS SHOULD REINTRODUCE COPYRIGHT FORMALITIES

If implemented fairly, copyright formalities have the capacity to alleviate frustrations, incentivize good behavior, disincentivize bad behavior, and create a rational administration of law.¹¹⁷ The Copyright Office itself has shown an interest in considering the reintroduction of both registration and recordation.¹¹⁸

A. *Copyright Registration is Currently Only Required to Bring Infringement Claims*

In general, an owner's decision to register his or her copyright is voluntary, and a copyright exists from the moment the work is created.¹¹⁹ The U.S. Copyright Office recommends copyright registration for a number of reasons. On its website, the Office states that many people "register their works because they wish to have the facts of their copyright on the public record and have a certificate of registration."¹²⁰ Also, "[r]egistered works may be eligible for statutory damages and attorney's fees in successful litigation."¹²¹ Lastly, "if registration occurs within five years of publication, it is considered *prima facie* evidence [of validity of the copyright] in a court of law."¹²² Although a copyright exists as soon as a work is created and registration is voluntary, formalities have not disappeared entirely from our copyright system. For instance, a

¹¹⁶ In 2019, YouTube brought a claim against Christopher Brady under the Digital Millennium Copyright Act, alleging that Brady used false copyright strikes to extort YouTube creators. Brady was threatening to hit creators with their third, and final, copyright strike if they refused to send him money through PayPal. YouTube has recognized that copyright claim abuse is a big issue on their platform. See Julia Alexander, *YouTube Sues Alleged Copyright Troll over Extortion of Multiple YouTubers*, THE VERGE (Aug. 19, 2019), <https://www.theverge.com/2019/8/19/20812144/youtube-copyright-strike-lawsuit-alleged-extortion-minecraft> [<https://perma.cc/KKB5-P6S8>].

¹¹⁷ Maria A. Pallante, *The Curious Case of Copyright Formalities*, 28 BERKELEY TECH. L.J. 1415, 1418 (2013).

¹¹⁸ *Id.*

¹¹⁹ *Copyright in General*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-general.html> [<https://perma.cc/VLQ5-RJTF>].

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

registration of a copyright with the Copyright Office is a prerequisite to initiate an infringement action.¹²³

There are, however, some deterrents that might prevent an owner from registering their copyright. According to the United States Copyright office website:

The Copyright Office charges a fee to register copyright claims based on the method you use to apply and the type of work you are registering. An application for copyright registration contains three essential elements: a completed application form, a nonrefundable filing fee, and a nonreturnable deposit—that is, a copy or copies of the work being registered and “deposited” with the Copyright Office. Generally, you should prepare a separate application, filing fee, and deposit for each work you submit. In certain situations, multiple works can be registered with one application.¹²⁴

It is easy to see how the fees and formalities involved in the registration of a copyright might keep an owner from registering with the United States Copyright Office. Any rational person might think that registration is not worth the hassle considering the fact that their copyright exists upon creation of the work. Unfortunately, the exact same scenario and logic apply to the recordation of copyrights.

B. Copyright Recordation is Currently an Entirely Voluntary Process

Whether or not a copyright owner has elected to register their copyright with the U.S. Copyright Office, they may nonetheless decide to enter into agreements that affect their ownership rights. For example, a copyright owner may decide to transfer their rights to another person or authorize others to use their works, even giving someone else control over ways in which a work is used.¹²⁵ As mentioned in Part I of this Note, Marvel did exactly this when it sold the Spider-Man film rights to Sony, which has since limited Marvel’s use of the character. Under section 205 of the Copyright Act, an owner may record documents pertaining to such agreements, and other documents pertaining to copyrights in the Copyright Office.¹²⁶

The United States Copyright Office does not require an owner to record a transfer of copyright ownership or other document pertaining to a copyright—the owner’s decision to do so is entirely voluntary.¹²⁷ However, like registration, an owner’s decision to record transfers of their copyright provides certain legal advantages. First, “[u]nder certain conditions, recordation establishes legal priority between conflicting

¹²³ *Id.*

¹²⁴ U.S. COPYRIGHT OFF., CIRCULAR NO. 4, COPYRIGHT OFFICE FEES (Mar. 2021) <https://www.copyright.gov/circs/circ04.pdf> [<https://perma.cc/VLQ5-RJTF>].

¹²⁵ U.S. COPYRIGHT OFF., CIRCULAR NO. 12, RECORDATION OF TRANSFERS AND OTHER DOCUMENTS (Sept. 2016), <https://www.copyright.gov/circs/circ12.pdf> [<https://perma.cc/99KQ-XH33>].

¹²⁶ *Id.*

¹²⁷ *Id.*

transfers or between a transfer and a nonexclusive license.”¹²⁸ Second, “[r]ecordation establishes a public record of the contents of the transfer or document.”¹²⁹ Third, “[r]ecordation of a document in the Copyright Office may provide the advantage of ‘constructive notice’”—meaning that “members of the public are deemed to have knowledge of the facts stated in the document and cannot claim otherwise.”¹³⁰ Constructive notice is established if the following two conditions are satisfied:

[1] The document or material attached to it specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work; and [2] registration has been made for the work.¹³¹

Although there are benefits to recording with the Copyright Office, there are some requirements that may prevent a copyright owner from doing so. Documents that are submitted for recordation are returned by the Copyright Office if:

The document does not have an original signature or proper certification; The document is illegible; The document is not capable of being reproduced legibly; The document is incomplete by its own terms; The document is marked as an “attachment” or “exhibit,” unless the person requesting recordation asserts that the document is sufficiently complete as it stands; The complete recordation fee is not submitted; It is unclear to the Copyright Office whether the document is to be recorded; or The document is submitted to the Office in error.¹³²

Just as is the case with registration—because of the formalities involved in the process—any rational person might think that recordation is not worth the hassle. This is particularly true considering the fact that the work is copyrighted upon creation. As an unfortunate result, many transferred works are never recorded with the United States Copyright Office.

United States copyright law has changed for the worse. Copyright formalities, mainly registration and recordation, used to be required under law. However, that is no longer the case. Even though copyright owners experience significant benefits when they register and record their copyrights, they are not required to do so. Copyright formalities are entirely voluntary, and the red tape required to undergo those formalities often prevent owners from pursuing them. If our copyright law were to require the processes of registration and recordation and, in essence, “reformatize” copyright, it would have the effect of counteracting many of the negative effects that our current copyright system suffers from and would prevent a great amount of harm that would occur from the copyright small claims court.

¹²⁸ *Id.* at 2.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 4–5.

C. The Reintroduction of Copyright Formalities Would Alleviate Frustrations and Create a Rational Administration of Law

Congress should require copyright owners to register their copyrights and establish an accessible database through the Copyright Office. Throughout most of America's history, there was a requirement that (1) "a work be registered before it could receive the protection of a copyright," and (2) "that works be deposited with the government before a copyright could be secured."¹³³ Today, "there is no requirement that you register a work to get a copyright; the copyright now is automatic."¹³⁴ The registration formality was abolished in the American copyright system when the United States followed European copyright law.¹³⁵ In 1908, international copyright lawyers amended the Berne Convention to abolish copyright formalities.¹³⁶ The formalities were universally hated because stories of inadvertent loss were increasingly common and many viewed copyrights as a "natural right."¹³⁷ While the view of copyright law as a natural right is "romantic," it makes for "absurd" practice.¹³⁸

The CTEA extended the life of copyrights to over a century in some cases. The length of the terms and the inability to distinguish what is protected has created a burden on the creative process.¹³⁹ Because formalities are not required, "it is often impossibly hard to locate copyright owners to ask permission to use or license their work."¹⁴⁰ This results in an expensive and inefficient copyright system, and with the creation of a copyright small claims court, even more expense will be incurred in the form of copyright infringement damages.

Copyright formalities present a way of bringing order to a system that has become confusing to the general population. Such formalities, specifically registration, should be reintroduced by Congress to mitigate the unintended side effects of a copyright small claims court. If Congress were to require copyright owners to file a registration with the Copyright Office, similar to the registration of domain names, it would significantly increase the ability for a person to discover if a work is copyrighted and then contact the owner to license its use if they would like to do so.¹⁴¹ By requiring a creator to register as a condition for receiving protection for their works, we establish that works for which registration has "not been completed on time will enter the public

¹³³ LESSIG, *supra* note 33, at 136–37.

¹³⁴ *Id.* at 137.

¹³⁵ *Id.*

¹³⁶ *Id.* at 250.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Stef van Gompel, *Copyright Formalities in the Internet Age: Filters of Protection or Facilitators of Licensing*, 28 BERKELEY TECH. L.J. 1425, 1432 (2013).

¹⁴⁰ LESSIG, *supra* note 33, at 249.

¹⁴¹ van Gompel, *supra* note 139, at 1433.

domain.”¹⁴² In other words, it would create legal certainty. Not only would a registration requirement allow the copyright system to promote the spread of knowledge, but it would also help prevent creators from facing liability for copyright infringement. By itself, a copyright small claims court could produce more harm than good; but in tandem with copyright registration requirements, it may provide a helpful avenue of enforcement for current copyright holders.

D. The Reintroduction of Copyright Formalities Would Not Incur a Significant Cost on Behalf of the United States Copyright Office and Serviceable Models for a Copyright Database Already Exist

Currently, the United States Copyright Office is already required to maintain records of copyright registrations and to make them available when someone from the public requests an inspection.¹⁴³ After a registration has been completed and a claim has been cataloged, the copyright becomes part of the public record.¹⁴⁴ The United States Copyright Office has always invited individuals from the public to come to the office and inspect its records.¹⁴⁵ Individuals from the public “may also request copies of registration records from the Copyright Office’s Records Research and Certification Section.”¹⁴⁶ The Copyright Office makes information from registration records dating back to January 1, 1978 available on the Office’s website.¹⁴⁷

The United State Copyright Office website states that these records and any documents that are recorded in relationship to them can be and are used “by the public to identify the author(s) and copyright owner(s) of a work.”¹⁴⁸ The public record also provides information about an agent of the owner who can be contacted to license the registered work or to request permission to use it.¹⁴⁹

Similarly, the U.S. Copyright Office’s Records Research and Certification Section “provides copies of completed and in-process recordation records (recorded documents, certificates of recordation, and related correspondence), search reports, and registration deposit materials.”¹⁵⁰ Just as is the case with registration materials,

¹⁴² *Id.*

¹⁴³ *Privacy: Copyright Public Records*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-privacy.html> [<https://perma.cc/E6GJ-NLJB>].

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Research Services Overview*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/trc/> [<https://perma.cc/885Y-X67J>].

“completed . . . recordation records, and search reports are available to any member of the public upon request.”¹⁵¹

Unfortunately, a person eager to discover whether a material is still under copyright may struggle to find such information, even if it has been filed with the United States Copyright Office. All requests must be submitted in writing, and those submissions are no easy task.¹⁵² For copies of records, written requests must clearly:

1. identify the type of records you want (for example, additional certificates of registration, copies of correspondence, copies of assignments);
2. specify whether you require certified or uncertified copies;
3. specify the records to be copied, including, if possible, details about
 - a. the registration number, including the letters representing the class in which the work was registered (for example, TX000-000, A000) (required);
 - b. the year or approximate year of registration (for example, 1985);
 - c. the complete title of the work;
 - d. the author(s), including any pseudonym by which the author(s) may be known;
 - e. the claimant(s); and
 - f. the type of work involved (for example, novel, lyrics, or photograph);
 - g. for a copy of an assignment, contract, or other recorded document, the volume and page number of the Copyright Office record where information on the recorded document can be found.¹⁵³

If a person requesting the information cannot provide a year of registration, registration number, and title for a work, the Copyright Office records may have to be searched for purposes of verification and the applicant will be charged a fee for the service.¹⁵⁴ After receiving a written request, the Records Research and Certification section will review them and quote fees for each.¹⁵⁵ There is no guarantee that a person requesting records from the Office will receive them in a timely manner. Turnaround times could be severely impacted depending on the type of service, how many items are being requested, and if expedited service was paid for.¹⁵⁶

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* Copyright search fees can become quite pricey. For instance, a search report can cost up to \$200 per hour with a minimum of 2 hours. An expedited report will cost a surcharge per hour for the first 2 hours plus an additional \$200 per hour base fee. *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

Despite the fact that the Copyright Office is required to keep information on registered and recorded copyrights and make them public record, the process can still be extremely costly and inefficient for users. With likely little increase in cost, the government could form a new and, hopefully, free public database where it could house all information on registration and recordation of copyrights. Some copyright databases already exist, but all are inadequate.

If a person desires to search for a copyright but would like to avoid going through the hassles presented by the Copyright Office, they can first attempt to search through the Library of Congress. The Library catalogs books, photographs, maps, music, movies, newspapers, and more.¹⁵⁷ The Library of Congress also works with the “Copyright Office to create a searchable database for works.”¹⁵⁸ For works published after 1975, one can visit their website.¹⁵⁹ The user may enter an author or title and see if there is a registration number and, if so, the year that the copyright was registered.¹⁶⁰ For works published before 1975, someone in search of a copyright may contact the Library of Congress and pay them to perform a search, or do the search on their own.¹⁶¹

Outside of the Library of Congress, there are numerous other online databases available to help a person locate a copyright owner or creator or to acquire a license to use a creative work.¹⁶² However, many of these databases are specific to a certain niche, and the fact still remains that the current compilation of copyright information is inadequate.¹⁶³ Simply requiring the registration and recordation of copyrights is not enough; the United States Copyright Office must also modernize the copyright registration and recordation systems if it wishes to meet the demands of the twenty-first century.

¹⁵⁷ *How Do You Find Out Who Owns a Copyright?*, NEW MEDIA RTS. (Oct. 27, 2020, 8:48 PM), https://www.newmediarights.org/book/how_do_you_find_out_who_owns_copyright [https://perma.cc/RYU4-3TRA].

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² The Copyright Alliance lists a number of such databases on its website and claims that many Copyright Alliance members have comprehensive databases that may be able to help a person in his or her search for a copyright owner or a license. The Copyright Alliance also states that there are so many of such databases, that it is not possible for them to list all of them on their website. *Find a Copyright Owner*, COPYRIGHT ALL., <https://copyrightalliance.org/resources/find-a-copyright-ownercreator/> [https://perma.cc/2YZ3-M35R].

¹⁶³ *Id.* For examples of these databases are listed on the Copyright Alliances website, and include: ASCAP ACE Repertory (US composers, songwriters, lyricists and music publishers) BMI Repertoire (musical works, songwriters, composers, and music publishers); SESAC Repertory (songwriters, composers and music publishers); Copyright Clearance Center (CCC) (published texts in the areas of science, technology, medicine, humanities, news, business, finance and more); and Picscout (reverse image look-up tool to find a copyright owner or photographer). *Id.*

A copyright database that is equipped to meet the demands of the twenty-first century should do a number of things. First, the database should be intuitive and user-friendly.¹⁶⁴ An interesting and appealing feature could be that users have the ability to perform a reverse image search to look up a registration on a work of visual art, similar to how Google's reverse image search works. Second, it should only include the information that is included in the registration form and should not burden rightsholders by requiring that they submit and maintain additional information that the rightsholder may not know.¹⁶⁵ Third, the database should merge registration and recordation data into a single, comprehensive database so that ownership information is searchable in one place.¹⁶⁶ Fourth, the database should be funded by the government, and if absolutely necessary, by affordable fees to the public that uses it.¹⁶⁷ Lastly, the database should provide incentives that encourage rightsholders to keep their information up-to-date without penalizing those who choose not to.¹⁶⁸

A solution could be based off of the United States Patent and Trademark Office ("USPTO") databases. For instance, the Trademark Electronic Search System ("TESS") is free to its users and has records for millions of trademarks.¹⁶⁹ Although the number of trademarks may appear daunting, TESS allows its users to design effective search codes that make searches easier and more effective.¹⁷⁰ Under TESS, "[a] design search code is a six-digit number that is used to classify and search for the prominent design elements featured in a trademark."¹⁷¹ Prominent design elements can be "anything that is not a word, such as a depiction of a bird, a star, or a flower."¹⁷² A similar design search code could be used to search for copyrights that feature images, like photos.

¹⁶⁴ *Id.* In order for it to be friendly to its users, it must incorporate some of the advanced search functions the public has come to expect of search engines like Google, Bing, LexisNexis, or JSTOR.

¹⁶⁵ *Id.* Requiring only the most basic information that is included on the registration form would help to keep the rights owners from seeing the experience as overly burdensome.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* It is important not to require fees from the rights holders. Since registration is voluntary, charging rightsholders fees will result in fewer registration and recordation filings and result in less data.

¹⁶⁸ *Id.* As discussed earlier, some legal incentives already accompany the registration and recordation of copyright material and the updating of that information. However, further incentive would ensure that rightsholders keep their information up to date and make those updates in a timely manner.

¹⁶⁹ *Get Ready to Search - Classification and Design Search Codes*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks-application-process/searching-trademarks/get-ready-search-classification-and-design> [<https://perma.cc/CRN3-QDA9>].

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

Similarly, the USPTO website makes it very easy for users to conduct preliminary searches of U.S. patents and published applications.¹⁷³ Although the USPTO has a Public Search Facility located in Alexandria, VA that provides the public access to patent and trademark information in a variety of formats including microfilm and print, it still maintains its online database free of charge to users. Patents may be searched in the USPTO Patent Full-Text and Image Database (“PatFT”).¹⁷⁴ Users may perform a search by using a combined word mark—meaning he or she searches the English words used in all marks and the English translations of foreign words or characters in all marks.¹⁷⁵ Lastly, the user may search by the patent owner’s name and address or just perform a general “all fields” search.¹⁷⁶

Patents and trademarks, like copyrights, are a form of intellectual property, and yet the compilation and accessibility of patent and trademark information is leaps and bounds beyond that of copyrights. The USPTO databases could serve as an example by which the United States Copyright Office could replicate a similar database for the compilation of copyright registrations and recordings. Such a database would alleviate any current frustrations with our copyright system and prevent future frustrations that would occur as a result of the establishment of a copyright small claims court.

VI. CONCLUSION

The United States’ copyright system is broken, and the newly instituted copyright small claims court will exacerbate its deficiencies unless Congress reintroduces copyright formalities like registration and recordation. The fear that Spider-Man would be kept from future Marvel movies brought our broken copyright law back into the public’s attention. As a result of the CTEA, copyright owners are difficult to track down and copyrights last for an extremely long time. The reintroduction of required copyright registrations and recordations is necessary because without them, the public will be less able to identify if works are copyrighted and who the owners are. Therefore, the reintroduction of copyright formalities will reduce the risk of liability of copyright infringement damages for creators.

Further, the United States Copyright Office must modernize the copyright registration and recordation systems if it wishes to meet the demands of the twenty-first century. Despite the existence of the Records Research and Certification section of the Copyright Office, the Library of Congress, and other copyright databases, our copyright compilation systems are still inadequate. In addition to the reintroduction of formalities, the Copyright Office should establish a modern database by which owners could register and record their copyrights, and users could access that information. Because the U.S. government is already required to record such information, and because a database could easily be replicated off of databases that already exist within the United States Patent and Trademark Office, it could come at little cost.

¹⁷³ *Search for Patents*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/patents-application-process/search-patents> [<https://perma.cc/5BHT-5EBU>].

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*