COPYRIGHT DURATION EXTENSION AND THE DARK HEART OF COPYRIGHT

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I was flabbergasted when I learned that Congress had copyright duration extension high on its agenda. American copyright law already gives authors protection of their works for fifty years beyond the death of the author.[1] This has always seemed generous to me, even overly generous. To add another twenty years, as Congress was considering, seemed patent nonsense. Of all the difficult issues facing the copyright world—many generated by the advent of the online era and the international stampede toward a global marketplace—why would duration extension get a second glance from an overburdened legislator? The cynic in me immediately concluded that this is simply another example of legislative capture by a wealthy constituency, specifically the publishing and motion picture industries. And the language of the proposed bill bore this out: the recipient of this windfall was the rightsholder at the time duration would have expired under the old law.[2]

Characterizing the duration extension legislative activity as merely "legislative capture," however, prematurely short-circuits the investigation into this surprising phenomenon. After all, Congress can only be captured when it is willing to be captured. Only Congress holds the singular power to make policy decisions for the national polity. No interest group is permitted to enter the House of Representatives or the Senate and vote. Again and again, Congress has been willingly captured by the publishing and motion picture industries. The reason is not far away: nothing succeeds like success. The American entertainment industry is this century's business success story. What rational American representative would want to put the brakes on an industry that makes billions of dollars, exports American culture (and propaganda) by the ton, and persuades the peoples of so many foreign countries that America is the world's leader? Especially when its products are often magic, what could it hurt to give favors to an industry that will goose a little more creative effort, a little more fun? America and Congress love Hollywood, because Hollywood is lovable.

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1 17 U.S.C. § 302(a)(1994).

2 The Copyright Extension Act of 1995, S. 483, 104th Cong., 1st Sess. (1995).

Despite the appeal of the copyright industries, the House of Representatives did not rush to vote for duration extension. Copyright experts were called to the Hill to testify on the wisdom of this proposal. This was not a stacked hearing; supporters and detractors spoke. More than one explained, with erudition and clarity, why he or she believed that duration extension is a mistake.[3] The critics, however, have not derailed the duration extension train's momentum. To the contrary, the issue has remained alive.[4] It is almost as though Congress cannot hear any copyright voices beyond that of the entertainment industry.

Professor Peter Jaszi has made the interesting point that he felt as though his own testimony opposing duration extension could not be heard. His constitutionally grounded discourse fell on deaf ears, according to him, because Congress has become accustomed to listening to copyright discussions with an ear for international trade considerations rather than constitutional considerations.[5] He concludes from his experience that constitutional discourse about copyright may have been permanently eclipsed by a focus on industries rather than authors and trade rather than the public good.[6] It is my view that Congress has never had a constitutional discourse on copyright.

There are two sources of rhetoric and meaning that have been underutilized in copyright legislation, one empirical and one constitutional. Each one corresponds to a particular federal branch. Congress holds special competence over the factual arena while the Supreme Court holds special competence over the interpretation of the Constitution.[7] Either or both could mitigate the narcotic effect that the entertainment industry and the breathtaking pace of globalization have had on Congress. Salient facts have the capacity to drown out purely rent-seeking activity that cloaks itself

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3 *See The Copyright Protection Act of 1995: Hearings on S. 483 Before the Senate Judiciary Comm.*, 104th Cong., 1st Sess. 23 (1995) (testimony of Peter Jaszi); *The Copyright Term Extension Act of 1995: Hearings on H.R. 989 Before the Subcomm. On Courts and Intellectual Property Comm.* 104th Cong., 1st Sess. (1995) (testimony of Dennis S. Karjala, representing U.S. Copyright and Intellectual Property Law Professors); *The Copyright Term Extension Act of 1995: Hearings on H.R. 989 Before the Senate Judiciary Comm.*, 104th Cong., 1st Sess. (1995) (testimony of Professor William Patry).

4 The Senate Judiciary Committee began consideration of, but did not complete action on S. 483, Copyright Term Extension Act of 1995 on May 17, 1996.

5 *See* Peter Jaszi, *Goodbye to All That—A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law,* 29 VAND. J. TRANSNAT'L L. 595 (1996).

6 *Id.* at 598.

7 *See, e.g.*, Miller v. Johnson, 115 S. Ct. 2475 (1995); United States v. Lopez, 115 S. Ct. 1624 (1995); Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

in the public good, while constitutional discourse, when enforced by the Court, is a crucial restraint on the exercise of Congress's policymaking power.

1. Congress and Factfinding

As an elected, representative body, Congress is properly focused at the national level with particular skill at making policy decisions. In our tripartite federal government, it is the superior factfinder.[8] Those capacities have been neglected when it comes to copyright issues.

There is an embarrassing lack of empirical research on the issue of the *mechanism* by which copyright law furthers the end of the public welfare designated in the Constitution. There is much talk in the literature and the cases of the "incentive" nature of copyright law.[9] But there is no factual study that shows how much incentive is enough to further creative activity, or what kinds of incentives work: money, control, or time. The fact is that we do not really know what difference twenty extra years would make.[10] A survey of the testimony before Congress on duration extension reveals no support for the many factual claims made about extension.[11] Rather, conclusions are based on hypotheses built on hypotheses.

Arguments in favor of copyright duration extension essentially boil down to the proposition that more years of protection will spur more creative activity. The empirical skeptic appropriately responds: how do you know? As so often happens, with the duration extension issue, Congress has not exercised its factfinding muscle.

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[8] *See* Katzenbach v. Morgan, 384 U.S. 641, 659 (1966) (Harlan, J., dissenting).

[9] *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (stating that the immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.); Sony Corp. Of America v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984) (same); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (same); *see also* Lawrence D. Graham & Richard O. Zerbe, Jr., *Economically Efficient Treatment of Computer Software: Reverse Engineering, Protection and Disclosure*, 22 RUTGERS COMPUTER & TECH. L.J. 61 (1996); Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1 (1995) (analyzing copyright's incentive structure); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989); Wendy J. Gordon, *An Inquiry Into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989).

[10] *See* Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control over Copyrighted Works*, 42 J. COPR. SOC. 93, 118-20 (1994). *cf.* Wendy J. Gordon, *Norms of Communication and Commodification*, 144 U. PA. L. REV. 2321, 2337 (1996) ("If not all goods and values are commensurable with money, that suggests that increasing the amount of money attached to a given behavior will not always generate a significant increase in the behavior.").

[11] *See* Dennis S. Karjala, *Comment of U.S. Copyright Law Professors on the Copyright Office Term of Protection Study*, 16 EUR. INTELL. PROP. REV. 531 (1994).

It is not as though Congress lacks expertise on copyright issues. The Copyright Office is part of the legislative branch, and could easily and appropriately serve as the base for such factfinding. With its years of experience and recordkeeping, it could be not only a source of guidance on empirical inquiries but also a treasure trove of copyright data.

2. The Supreme Court's Emerging Constitutional Role in Copyright Policy

Constitutional discourse regarding copyright law has always tended to fall on deaf ears in Congress, and therefore Professor Jaszi's *farewell* to such discourse is misplaced. In fact, Congress's failure to hear constitutional arguments has more to do with its institutional competence than it does with the death of copyright constitutional discourse. Congress is the federal branch least suited to hearing constitutional arguments. It is the Supreme Court that is institutionally designed to hear constitutional arguments and to interpret constitutional clauses. When the Supreme Court speaks to the meaning of the Copyright Clause, Congress *must* listen. If it does not, it risks having its hard-won enactments narrowly construed and even invalidated. Unlike those testifying to Congress, this is constitutional discourse with punch.

The Court, however, has infrequently exercised its authority to interpret the Copyright Clause for the purpose of cabining or justifying Congress's forays into copyright policy. That may be changing. In the Court's recent decision in *Feist,* it went out on a limb to craft a constitutional opinion when statutory interpretation alone might have been enough.[12] In that case, the Court did not satisfy itself with interpreting the copyright statute in line with undefined constitutional norms, but rather declared that originality is a constitutional requirement, which leaves those works lacking originality necessarily beyond congressional power under the Copyright Clause.[13] Like the decision in *Bonito Boats,*[14] the *Feist* decision strongly implies that when a work falls out of the Copyright Clause, it falls into the public domain, for the benefit of all. Thus, the clause draws an important line between those works that can be controlled by authors and those that cannot.

We will need even more constitutional guidance from the

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12 Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991). *See also* Marci A. Hamilton, *Justice O'Connor's Intellectual Property Opinions: Currents and Crossroads,* 13 Women's Rts. L. Rep. 71 (1991).

13 *Feist,* 499 U.S. at 347.

14 Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989).

Supreme Court as globalization continues apace. The Supreme Court, and the Constitution, are bulwarks between this country's political identity and the bubbling cauldron of world opinion. It is absolutely necessary in the globalization race that we remain true to our highest political ideals. Those ideals are reflected in the Constitution. Constitutional review of legislative measures like duration extension—which attempt to keep us in the globalization race—is one important means of achieving that goal.

Duration extension that benefits the entertainment industries and not authors raises serious constitutional questions for two reasons. First, the plain language of the Constitution states that Congress has the power to enact law "[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."[15] The language speaks for itself.

Second, the decision to place the duration extension in the hands of publishers runs squarely against the purpose of the Copyright Clause. The *reason* the Constitution limits the recipient of the monopoly power to authors resides in the single, unifying theme of the entire constitutional enterprise: the decentralization of power.[16] The British Statute of Anne, the precursor to the American Copyright Clause, was adopted for the purpose of reducing the monopoly power of the publishing industry and decentralizing that power by placing it in the hands of individual authors. The marketing and concomitant lobbying power of the copyright industries, and their repeated victories at the expense of individual authors (most particularly in the work-made-for-hire context) is a clarion call to the Court to read the Copyright Clause with fresh attention and historical understanding. Although the Court is appropriately loathe to substitute its policy judgments for those of Congress,[17] it has an obligation to effect the means by which the Constitution divides power within the government and, under the Copyright Clause, within the society. Even if the rest of the world is willing to acquiesce in the consolidation of copyright power in the entertainment industries, we should not be. In fact, globalization

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

16 The Constitution is rife with overlapping means of decentralizing and limiting power for the purpose of effecting liberty, *e.g.*, separation of powers between the three federal branches, the enumeration of powers, federalism, and an explicit bill of rights intended to provide further explicit limitations on a government already limited to explicitly enumerated powers.

17 *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978); Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955); United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

should reinforce the moral and mettle of the United States Copyright Clause. Consolidation of such power is even more disturbing at the global level than it is at the national level.

3. Conclusion

What follows are two strikingly different and deeply intelligent responses to the duration extension proposal. Professor William Patry focuses upon who *deserves* the extra years. Working from a constitutional and a copyright policy perspective, he persuasively concludes that it must be the author. With a great deal of courage, he makes absolutely clear that term extension is a classic rent-seeking statute, which benefits powerful lobbying interests without serving those the Constitution explicitly designates as beneficiaries of the copyright monopoly, authors.

Professor Reichman takes a different but equally illuminating perspective, the international perspective. With a great deal of force, he shows that this duration extension drive would not actually standardize copyright terms around the world, as its proponents claim. To the contrary, in some instances, this duration extension would exacerbate differences in copyright treatment between countries. He even goes so far as to argue that uniformity is an unattainable goal. If uniformity is not to be the teleology of copyright law, then we are forced back to first principles. According to Professor Reichman, first principles do not make the case for a twenty-year term extension.

In the end, the copyright duration extension story is a morality play about the dark, empty heart of copyright. It is a call to find our moorings so that we may appropriately judge whether to follow an emerging uniform standard or to lead the world toward a different, more acceptable standard. Better empirical understanding and closer attention to the Constitution can help. It is also a warning: the seemingly amoral goal of international standardization is in fact a shield behind which less public-spirited interests may seek their own ends.