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TOPIC: COPYRIGHT TERM EXTENSION ACT AND ITS IMPACT ON COMPETITION LAW

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DECLARATION

I, Bhavishya B, hereby declare that this dissertation titled "Copyright Term Extension Act and its impact on Competition Law" in furtherance of completion of the one year residential Masters in Law programme (LLM) in Intellectual Property Rights and Technology Law at Centre of Postgraduate Legal Studies in O.P. Jindal Global University, under the exceptional support and able guidance of my supervisors Prof. Swasti Gupta & Prof. Paarth Naithani, Professors at Jindal Global Law School.

I further declare that this dissertation is the synthesis of my original work and analysis based on case laws, research papers, reports, scholarly works, news articles, etc., which have been duly cited wherever they are referred to during the course of the given dissertation. I have duly adhered to the CPGLS guidelines and dissertation policy for the captioned LLM programme.

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ABSTRACT

Over the years, Congress has periodically increased the duration of copyright protection. Under the Copyright Term Extension Act (CTEA), the protection period for copyrights has again been extended by another twenty years. Now, the creator will enjoy copyright protection over his work for 110 years. This means, in most cases, a new creator has to obtain a copyright license from someone who is not even the original creator. Therefore, this puts limitations on people's capacity to recreate, and in turn, creates a conflict between creators and the general public, because by denying access to works that should be available to the public, artists are burdened with high costs and are deterred from producing more works.

For instance, Disney has been able to effectively protect its characters under copyright law up to this point, and with the enaction of the Copyright Term Extension Act (CTEA), it obtained an additional 20 years of copyright protection for works published after 1923. Given that the US Constitution (Article 1, Section 8(8)) grants creators and innovators an exclusive right to their work for a Limited Period of time. However, the enactment of CTEA should be considered a misuse of this jurisdiction.

Moreover, giant corporations such as Disney have gained market dominance in the entertainment industry by utilising a state-sanctioned copyright monopoly. Although copyright legislation is meant to safeguard artists and innovators, it is currently being abused to safeguard companies' interests through influence and manipulation. The research paper explores the intersection of copyright law and antitrust law, with regard to the enactment of the Sonny Bono Copyright Extension Act. The research discusses the constitutional validity of the Copyright Extension Act with the help of various case laws dealt with by the Supreme Court of the United States. Overall, the research tries to show the impact of the said Act on the US competition law.

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RESEARCH QUESIONS

1. Is the Sonny Bono Copyright Extension Act violative of the US Constitution?

2. Whether the Extension of the Copyright term has any implications on Competition Law?

RESEARCH METHODOLOGY

The dissertation is using a doctrinal approach. The study will make use of a descriptive and thorough analysis of legal provisions located in original sources (cases, statutes, or regulations). The researcher will also utilize comparative and critical analysis to evaluate the various bodies of law and how a legal issue's resolution can differ under each set of laws. Both original sources and secondary sources are used in the study. The texts of laws are considered primary sources, whereas books, essays, scholarly papers, etc., are considered secondary sources.

LITERATURE REVIEW

There exists a vast amount of literature on the copyright term extension Act and its implications on the competition and the constitutional validity of the Act. Congress has continuously increased the copyright term to another 20 years amounting to 110 years of protection through the introduction of the Copyright Term Extension Act (CTEA). Victoria Grzelak[1] says that the CTEA has created a restriction on the ability of the public to promulgate speech, thus leading to agitation between the creators and the public. Joseph A Lavigne[2] mainly focuses on how the copyright holders are unfairly benefitting from CTEA and how it is resulting in income inequality. Richard A. Epstein[3] says that it is crucial to differentiate between two instances in order to assess the validity of the CTEA., that is, the copyright term extension for the existing copyright and increasing the term of the copyright for future works. The author says that it is important for copyrights to be confined to limited periods because, while there is an advantage of copyright's long term as it acts as a property right and provides incentives to the creators for innovation, one shall not forget that such an extension may tend to create a legal monopoly by restricting dissemination since the owner will charge fees to get access to their works.

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[1] Victoria A Grzelak, Mickey mouse and Sonny Bono go to court: The Copyright Term Extension Act and its effect on the current and future rights.
[2] Joseph A. Lavigne, 'For Limited Times - Making Rich Kids Richer Via the Copyright Term Extension Act of 1996' (1996) 73 U Det Mercy L Rev 311
[3] Richard A. Epstein, "The Dubious Constitutionality of the Copyright Term Extension Act," 36 Loyola of Los Angeles Law Review 123 (2002).

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The Second chapter focuses on the constitutional validity of the CTEA. Patrick H Haggerty[4] studies the constitutional implications of the CTEA and argues that the Act violated Article 1 Section 8 of the American Constitution by repeatedly increasing the copyright protection period for copyrighted works and ignoring the aspect of public interest. Arlen Langvardt and Kyle Courtney[5] also study the constitutionality of the CTEA by analysing the Supreme Court decision in the case of Eldred v Ashcroft.[6] The authors agree with my opinion that by upholding the validity of CTEA, the decision of Eldred v Ashcroft violates the copyright clause on limited copyright protection engraved in the American Constitution, and this results in denying public access to creative knowledge. Further, the research also takes into consideration the arguments for the CTEA. Justice Joy Rillera[7] justifies the acts of congress and says the CTEA does not violate the Constitution's copyright clause because the limited time clause is subjective and does not impose limits on the duration. She says that even though there are negatives, the Act does not prevent the public from creating works built upon the existing copyrighted work owing to the limitation of fair use.

The Third chapter focuses on the impact of the CTEA on the competition and the antitrust concerns raised by its implementation. William M Landes and Richard A Posner study the impact of the CTEA on competition law and say that the Act has anticompetitive effects because it reduces competition in the market for creative works. Peter K. Yu[8] argues that even though the copyright legislature aims at protecting the rights of craters and promoting innovation, it can be misused to stifle competition. This occurs when a copyright holder prevents the public from accessing their work and creating similar works through copyright laws, thereby limiting the choices of consumption and then increasing the prices of accessing their work. Yu, in his paper talks about the ways competition law, can be used to intervene in such circumstances and protect the interests of the consumers. There is limited material on the impact of CTEA on competition law of countries outside the borders of the USA, like India as the Act has not been adopted in India as of now. This research tries to fill that gap and tries to foresee the implications of such an Act being adopted in a country like India.

The Final chapter emphasizes the need to balance the interests of both the creators and well as the public and also lays down recommendations to strengthen the IPR and Competition Law regimes in order to avoid misusing copyright laws and prevent antitrust issues. Patrick H Haggerty[9] in his paper lays down alternative approaches to balance the interests of creators and the public with the intent to promote innovation and access to creative works. He lays down interesting approaches such as the setting of copyright duration according to the nature of the work, creating a public domain trust that ensures public access but also works towards

[4] Patrick H. Haggerty, 'The Constitutionality of the Sonny Bono Copyright TermExtension Act of 1998' (2002) 70 U Cin L Rev 651

[5] Arlen W. Langvardt & Kyle T. Langvardt, 'Unqise or Unconstitutional: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit' (2004) 5 Minn Intell Prop Rev [i]

[6] 537 U.S. 186 (2003)

[7] Joy Rillera, 'Eldred v. Ashcroft: Challenging the Constitutionality of the Copyright Term Extension Act' (2003) 5 Vand J Ent L & Prac 23

[8] John T. Cross & Peter K. Yu, Competition Law and Copyright Misuse, 56 Drake L. Rev. 427 (2008). Available at: https://scholarship.law.tamu.edu/facscholar/387

[9] Ibid 4.

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preserving the rights and interests of the copyright holders, and promoting compulsory licensing for certain works. Langvardt and Langvardt[10] while conveying that copyright legislation must be designed in such a way as encourage creativity and also protect public interests, lay down certain approaches. They suggest that limiting the copyright protection period to 50 years after the author's death would be a reasonable approach. They also emphasize the doctrine of fair use and say that courts should adopt it while deciding on copyright cases. Various other authors have put forth various approaches such as Noga's idea of securitization of copyrights so that copyright holders can monetise their works without assessing control, allowing them to earn income as well as enabling public access.

The research concludes by emphasising the need to balance the objectives of Intellectual -Property Laws and Competition Laws. J. Michael Keye[11] opines that the length of the copyright term should be determined by a realistic evaluation of what kinds and quantities of returns are available to copyright holders since copyright is designed to guarantee a fair return to that holder. what should be focused on are the chances for exploitation, not the duration of protection for creative works, in order to accurately determine what kind of return is reasonable. To conclude, The CTEA's encroachment into the public domain is not substantiated by the benefits that creators and huge organisations will get.

[10] Ibid 5.

[11] J. Michael Keyes, 'Whatever Happens to Works Deferred: Reflections on the Ill-Given Deferments of the Copyright Term Extension Act' (2002) 26 Seattle U L Rev 97

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CHAPTER 1

INTRODUCTION

One of my favourite Hollywood classics, Breakfast at Tiffany's which was released in the year 1961 is still not yet in the Public Domain and thus, not accessible by the general public. The copyright on the 1961 film was originally supposed to expire in 1989, but due to the introduction of the Sonny Bono Copyright Term Extension Act, it was extended to 70 years after the passing of the last surviving author. Truman Capote's 1958 novella served as the inspiration for the film. The Truman Capote Literary Trust has the novella's copyright, which has not yet expired. Hence, it would be against the law to utilise the movie or novella in any way, including modifications, reproductions, and distribution, without the owners' consent. It still seems absurd that those 1920s works are only now becoming public domain while other nations, other than the USA, are gaining works from the 1940s or 1960s.[12] Therefore, instead of fretting over copyright term extensions, we should perhaps be looking for ways to shorten the copyright term to a more practical term.

1.1 THE COPYRIGHT LAW AND ITS EVOLUTION

The copyright system is age old, owing its origin to England. The Statute of Anne was the first copyright law that was enacted by the British Parliament in 1710, which provided the writers with a fourteen-year exclusive licence to reproduce their works. The work entered the public domain at the conclusion of the renewal period. The first ever Copyright Act was passed in the year 1790, right after the ratification of the American Constitution. Similar to the Statute of Anne, the Copyright Act, 1790 also granted an initial term of copyright protection of fourteen years followed by a potential renewal period of fourteen more years if the author was still living, adding up to a total of twenty-eight years of Copyright protection. Additionally, the author had the liberty to assign his rights away during the renewal term.

Congress has extended the copyright term's duration and the kinds of works it protects throughout time.[13] In 1831, Congress increased the original tenure from 14 to 28 years, and maintained the renewal term unchanged. The Act permitted works that were no longer monetarily beneficial to the author to enter the public domain towards the end of 28 years. Further, in the year 1909, Congress again made changes in the Copyright Act by increasing

[12]Mike Masnick, 'Hopefully For The Last Time: The US Has Zero New Works Enter The Public Domain On January 1st' (Tech Dirt, 28 January 2018) <https://www.techdirt.com/2018/01/02/hopefully-last-time-us-has-zero-new-works-enter-public-domain-january-1st/ > Accessed 22 March 2023.

[13] Brian A. Carlson, "Balancing the Digital Scales of Copyright Law,"(1997) 50 SMU L. REv. 825, 830.

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the renewal term to another twenty-eight years, allowing for a total of fifty-six years of protection.[14]

The invention of computers and photocopy necessitated for new changes into the Copyright legislation, and thus, the Copyright Act of 1976 was brought about. The 1976 Act changed the length of copyright period to the author's life plus fifty years. The United States' intention to ratify the Berne Convention was one of the factors that resulted in this extension.[15] Gradually, the rights enjoyed by the copyright holders saw an increase, and in the year 1998, the Copyright Term Extension Act, 1998, was enacted, which lengthened the duration of copyright protection yet again.

1.2. COPYRIGHT TERM EXTENSION ACT, 1998.[16]

The Copyright Term Extension Act of 1998, also known as the Sonny Bono Act and the Mickey Mouse Protection Act, is enacted to extend the term of the copyright protection for the authors. The Act extends the copyright term for another 20 years of all copyrights. It made the following changes: (i) "*The Act extends the term to the life of the author plus seventy years for works created in 1978 or later and to which an individual author holds the copyright;"*[17] (ii) "*For anonymous, or made-for-hire works created in 1978 or later, the term is increased from 75 to 95 years from the year of publication or from 100 to 120 years from the year of creation, whichever comes first;"*[18] (iii) "*The renewal term for works produced before to 1978, for which the initial copyright term was twenty-eight years, is increased from forty-seven to sixty-seven years, resulting in a total period of ninety-five years."*[19]

The practice of copyright term extension is not new to Congress. The justification given by the Congress for the enactment of CTEA is that, the CTEA will help *"stimulate the development of new works and provide greater economic incentives to maintain old works," and "such an extension will strengthen the long-term volume, vibrancy, and accessibility of the public domain."*[20] Congress also claims that the shelf life of works of authorship have been extended owing to the recent technical advancements, especially in the multimedia sector and the advent of the internet, which has created an increase in demand for content.

1.3. COPYRIGHT LAW OBJECTIVES VIS-A-VIS CTEA

[14] Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 (1943).
[15] Berne Convention for the Protection of Literary and Artistic Works, 25 U.S.T. 1341.
[16] Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17. U.S.C. §§ 108, 203, 301-304).
[17] 17 U.S.C. § 302(a) (2000).
[18] Id. § 302(c)
[19] Id. § 304.
[20] S. REP. No. 104-315, at 3 (1996). Senate Reports are reports by legislative committees on proposed legislation and/or conclusions from ongoing investigations.

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It is interesting to note that the two most important goals of copyright law contradict each other. One goal is to share cultural knowledge and educate the public about other cultures. The other goal is to promote creativity by enabling authors to produce new works by granting them temporary access to the rewards of their work. The Society requires access to literary creations that are open to everyone's use, scrutiny, and transformation. Such freedom of thought and expression is fundamental to the functioning of democracy. So, copyright aims to strike a compromise between society's overall interests and the artists' own economic objectives. The controversy around copyright's term extension takes place in this conflict.

In other words, society's rights to utilise and enjoy literary creations would be temporarily frozen and transferred to the author. The government gave a copyright monopoly to see to that the inventor received a "fair return" for their work. Any work that was formerly held solely with the author is now owned by the general public after the limited time period has passed.

Copyright, which was initially designed as a mechanism to protect the author and give incentives for them to produce for the good of society, is now increasingly seen as a mechanism to enrich big corporations. According to the findings of a significant recent European study, when posed a question as to who gains the most from Copyright protection, more than 40% of the people picked big corporations and only prominent artists rather than independent innovators or society at large.[21] Thus, it seems as though copyright is typically presented as an investment-protection tool rather than as a way of advancing culture and society in discussions on the current need to improve legal protections.

1.4. INDIAN SCENARIO

The copyright legislation is relatively new in India, and is strongly influenced by the British Copyright Act. This has benefited India because Britain is one of the creators of the Berne Convention and this made sure that Indian law matched international standards. As a result, India had copyright legislation in place during independence which was entirely compliant with copyright conventions worldwide and technological advancements.[22]

The Indian Copyright Act, 1957 provides copyright for cinematographic works for 60 years from the date of the publication. However, in the year 2008, big names in the industry such as Yash Raj approached the Human Resource Development Ministry to seek for the extension of the copyright term of cinematographic works from 60 years to 95 years. What caused this move is the fact that many Bollywood classics belonging to big production houses such as RK films, were coming to an end and were going to the public domain.

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[21] 'European Citizens and Intellectual Property: Perception, Awareness and Behaviour' (OHIM Report, November 2013) 66.
[22] Mohd. Zafar Mahfooz Nomani and Faizanur Rahman, "Doctrine of Fair Use, Digital Right Management and Comparative Copyright" (2018-19) 26 ALJ, 77.

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The scenario in India is not very different from that of the United States. Predominantly, the copyright holders are not the families of film makers, but are big production houses such as Yash Raj Productions, which means that who actually benefits from the copyright term extension are the rich media corporations. Those in favour of the extension argue that with the increase in use of platforms such as mobile phones, and the internet, the commercial viability of movies is also increased and are bringing in more money than conventional movie theatres.[23]

These arguments by the film producers were supported by the ministry, but were not accepted by the parliament and thus, the extension of the copyright did not happen in the Copyright Amendment Act of 2010. However, there were other amendments related to the term of the copyright of cinematograph works in case of joint authorship. The copyright term was further extended to another 70 years. The amendment makes it possible for the producer and the director of a movie to collaborate, and the director will now have a copyright protected for 70 years as compared to the producer's 60 years. As a result, the term of protection for films has essentially been increased from 60 to 70 years. Therefore, it can be witnessed that the movement to extend the copyright term is just getting started, and India will soon witness discussions identical to those that CTEA in the US had to deal with.

[23] Chetan Chauhan, 'Extend copyright period for films to 100 yrs: industry', *Hindustan Times,* (New Delhi, 1st July 2008).

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CHAPTER 2

CONSTITUTIONALITY OF THE CTEA

After the Bill was introduced by Congress as a legislation, various objections were raised by academics, and researchers who even campaigned to block the bill's adoption until more study could establish if it would have any positive or negative impacts. Moreover, opponents of the measure have said that it is illegal in its current form because it violates the "limited time" provision of the American constitution's Copyright Clause and does not advance the goals of copyright law as stated in that clause.

2.1 "LIMITED TIME" UNDER ARTICLE 1 SECTION 8 OF AMERICAN CONSTITUTION

The American Constitution's "Copyright Clause," included in Article I, Section 8, has been interpreted as granting both rights and restrictions on copyrights. The section goes, *"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]
Notwithstanding the fact that the Constitution specifically gives Congress the authority to regulate copyright, the provision on its face imposes two significant restrictions on this authority, i.e., the protection must be for a "limited period of time." Furthermore, publishers, and distributors are not eligible for the monopoly that the Constitution permits to be given; rather, it is only permitted "to Writers and Inventors. By doing this, the Constitution aims to prevent Congress from going beyond the bounds of the Copyright Clause. Congress is likewise obligated by the Copyright Clause to strike a balance between the interests of writers and publishers and the general welfare of the public. Therefore, the centre of the debate is this phrasing of the Copyright Clause. Is Congress subverting the Framers' intentions and thereby establishing an indefinite copyright term?

2.2 THE INTENDED PURPOSE

On the bare reading of the Constitution, the Copyright Clause is intended to "Promote advancement in science and useful arts."[25] However, there is little information offered by the drafters on how this stated aim was to be fulfilled. The word "public domain" is used to denote the absence of a copyright claim or the expiration of a copyright, permitting unrestricted use of the contents. The concept of public domain exists mainly because the development of new works inherently relies on the appropriation of pre-existing ideas, and new artists often rely on a robust public domain.

[24] U.S. CONST. art. 1, § 8, cl. 8.
[25] ibid

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The definition of fair use is "the right of those other than the owner of the copyright to use the copied work in a lawful manner without the owner's consent."[26] This doctrine uses a basic approach to decision-making that includes four statutory considerations in addition to any other factors the court considers relevant. The commonality between these doctrines is that they both exist to benefit the welfare of society at large. It is challenging to strike a balance between the rights of the general public and those of artists and innovators since both of these concepts are vague. [27] Nonetheless, the interests of the public were the driving force behind such protection. The Framers succeeded in achieving their main goal of spreading more creative works for the "wide public welfare" by promoting the interests of the authors.[28] The fundamental tenet of copyright thus calls for a delicate balancing of two opposing interests: the protection provided to authors must be sufficiently broad to serve as a financial incentive while ultimately being sufficiently narrow to represent the best interests of the public.[29]

In the words of Justice Stevens, "*The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.*"[30] This brings us down to the question of whether the CTEA is an overreach of Congress's authority to issue copyright and therefore, is it unconstitutional?

2.3 ELDRED V ASHCROFT[31]

The Copyright Term Extension Act, which increased the copyright protection term for works produced after 1978, from 50 to 70 years after the author's passing, was challenged as being unconstitutional. The plaintiffs in this case argued that the CTEA violated the "Limited times" copyright clause and the First Amendment of the United States Constitution. They said that the expansion put an excessive burden on free expression and was incompatible with the goal of copyright law, which is to advance research and the useful arts. The Act was maintained as constitutional by the Supreme Court, which ruled that the Copyright Clause of the Constitution gives Congress the authority to extend copyright periods. Moreover, the court determined that the extension did not go against the First Amendment since copyright law already includes protections for free expression, such as fair use.

2.3.1 ARGUMENTS IN FAVOUR OF CTEA

[26] Cohen, J.E., "The Structure of Copyright: Exploring the Metaphysics of Property in the Information Age" (1996) 105 Harvard Law Review 1723.
[27] Victoria.A. Grzelak, "Mickey Mouse & Sonny Bono go to Court: The Copyright Term extention act and its effect on Current and Future rights" (2002), 2 J. Marshall Rev. Intell. Prop. L. 95.
[28] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)
[29] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417,429 (1984)
[30] ibid
[31] Eldred v Ashcroft, 537 U.S. 186 (2003)

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Firstly, the proponents of the Act think that by extending the copyright term, creators would be encouraged to produce more works since they would have a longer time to reap the financial rewards of their labours. Secondly, the copyright owners spend a lot of money producing and marketing their works, and a longer copyright term would allow them to recuperate those costs more quickly. Thirdly, the CTEA complies with the international standards, such as the Berne Convention, to which many other countries are also signatories, and thus it is beneficial to stay in sync with other foreign legislations. Fourthly, Longer copyright periods would foster the preservation of older works since their owners would have more financial motivation to keep them up and make them available. Lastly, Advocates for the bill contended that copyright holders would be more inclined to make older works accessible to the public if they could continue to benefit from them for a longer time.[32]

2.3.2 ARGUMENTS AGAINST THE CTEA

The opponents of the Act contend that the CTEA violates the "limited times" provision of the Copyright Clause in the U.S. Constitution, which grants Congress the power to *"promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."*[33] Firstly, the plaintiffs argued that the extending of the copyright term by 20 more years goes beyond what is necessary to incentivize creativity and innovation, and therefore makes in unreasonable.
Secondly, the CTEA harms the public domain by extending the copyright term and delaying the works entering the public domain for another 20 years. Public domain is a crucial source of ideas and inspiration for creators, and thus, the delay created by the CTEA limits the ability of future creators to build on or adapt those works. Thirdly, the CTEA was said to be disproportionately benefiting large corporations and copyright holders at the cost of the public, because the extended copyright term allows corporations and copyright holders to continue to profit from their works for an additional 20 years, even if those works are no longer culturally or commercially relevant. Finally, the CTEA ignores the changing nature of creativity and innovation in the digital age. In an era where technology makes it easier than ever to create, distribute, and re-create works, a longer copyright term may actually hinder creativity and innovation by stifling the opportunity for creators to build on existing works.[34]

Ultimately, the Supreme Court upheld the constitutionality of the CTEA in Eldred v. Ashcroft. However, the arguments against the CTEA raised in the case continue to be relevant in debates over copyright policy today. The decision sets an alarming precedent for the future of the copyright regime as it holds that the actions of congress are justified.[35] It was held that congress owns broad powers to extend the term of the copyright. The decisions put out a message that the courts prioritize the interests of the copyright holders over the interests of the general public.

[32] ibid
[33] ibid 25
[34] ibid 32
[35] Ibid 7.

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2.4 CONCLUSION

In India, the Indian Copyright Act of 1957 under its provisions provide guidelines on the way copyright is exercised. Under section 22 of the Act[36], it provides for the limited term of copyright protection of authors, depending on the nature of the work. The copyright term for Literary, Dramatic and Musical works is lifetime of the author plus 60 years, and for Cinematographic works, it is 60 years from the year in which the work was published.[37] This shows that though it is not expressly said, the copyright is provided for a period of 60 years so that a limitation on the exclusive use is created in terms of time. Thus, the Indian copyright law also is consistent with the US copyright law and if a situation arises which tends to increase the term of copyright from 60 years to beyond it will have a negative effect as it will work in contrary to the objective of the Indian copyright act.

To conclude, even though the decision in Eldred v. Ashcroft validated the constitutionality of the Copyright Term Extension Act, the two main constitutionality issues still remain, i.e., the Act not furthering the objectives stated in the Constitution's Copyright Clause, and the Act violating the "limited period" wording of the provision. The Constitution clearly expresses that its intention is to promote the development of science and useful Arts. By extending the period of already existing works, the Act as it is now constituted falls short of fulfilling this stated objective. The goal of American copyright law is to strike a balance between the financial interests of the individual inventor and the benefits to society from a work entering the public domain. The retroactive section of the Act does not fulfil the requirements of the Copyright Clause, and thus, should be ruled illegal because such an unreasonable extension of copyright works exceeds Congress's jurisdiction under the Copyright Clause.

[36] Section 22, Indian Copyright Act, 1957.

[37] ibid

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CHAPTER 3

COPYRIGHT AND COMPETITION

Once upon a time in Hollywood, five major studio houses ruled the whole industry, and controlled every sector from production to distribution. This practice was later on ruled to be as "anti-competitive", and was ordered to be put to an end. Copyright is important, but so is maintaining competition in the market. The movie "*Hail, Caesar"*, portrays the pivotal year for the motion picture business, the year 1951. The movie revolves around how due to a Supreme Court decision; studios had to sell their movie theatres since the studio system was failing. The film perfectly portrays the concept that we are discussing in this chapter- the Interplay of Copyright Law with Competition Law.

In the previous chapter, we talked about the issues with the unreasonable extension of the copyright period. This chapter will concern with the use of copyright law to gain a competition in the market. Copyright is important because it grants exclusive rights to the authors for their creative works. While enabling copyright owners to reimburse what they initially invested is the immediate purpose of a copyright, the long-term objective is to promote the production and distribution of creative works.[38] In the previous chapter, we discussed how copyright law has contradicting goals. To ensure the proper balance between the two objectives, i.e., exclusive ownership and public access, the copyright system has various incorporated protections, such as fair use, de-minimus, the defence of parody, etc. Given these protections, it is reasonable to infer that the public interest is appropriately taken into account by the copyright system. However, Over the past two decades, the balance of power in the copyright system has substantially tipped in favour of copyright owners. With the development of new communications technologies, the market power of copyright owners has also increased[39], and this expanding power has encouraged the copyright holders to exercise their exclusive rights beyond what is authorised under the grant. Courts are now progressively depending on legal principles that are not part of the copyright system, such as competition law.[40]

The goal of competition law is to foster genuine, impartial competition in the market for products and services. However, the lawmakers established that there shall be no regular competition in copyright law, as long as the copyright period is in effect. Therefore, in many ways, copyright is a governmental monopoly grant. The problem occurs when competition in markets is hampered or destroyed by a copyright owner's dominating position in the market. The copyright owner can abuse his dominant position by a few ways such as:

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[38] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151,156 (1975).
[39] Peter K. Yu, Anticircumvention and Anti-anticircumvention, 84 DENV. U. L. REV. 13 (2006).
[40] Ibid 8.

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1. Seeking a lower rate from the licensee. Copyright grants its owner the authority to disseminate the copyrighted work, giving them a strong negotiating position with potential customers or licensees. They could potentially be able to use that bargaining leverage to force concessions from a licensee if there is enough market demand for the particular copyrighted work.
2. Restricting the licensees from dealing with rivals by way of exclusive supply contracts or other tying arrangements by way of which the copyright owner obtains an unfair advantage by limiting the competitor's capacity to contend with that other product in the market.

3.1 MONOPOLY AND COPYRIGHT

The most apparent instrument for tackling the problem of copyright infringement is the law of Monopolies, or as we might call it in the United States, the Anti-trust Law. Since we are dealing with the Copyright Term Extension Act in the US, let us limit our discussion to the Competition law regime in the United States.

The Competition in the United States is essentially governed by the Sherman Act[41] and the Clayton Act.[42] The most important provisions are Sections 1 and 2 of the Sherman Act. These clauses declare, in part, the following:
§ 1. "Trusts, etc., in restraint of trade illegal; penalty Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony."[43]
§ 2. "Monopolizing trade a felony; penalty Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."[44]

3.1.1 THE COPYRIGHT MISUSE THEORY

Copyright misuse is the justification for charges of copyright infringement. The one who is alleging misuse merely needs to demonstrate that the copyright is being utilised in a manner that is against the principles underlying copyright ownership. One circumstance in which copyright abuse happens is when the copyright is connected to an antitrust violation by the

[41] Sherman Act, 15 U.S.C. §§ 1-7 (2000 & Supp. 2007)
[42] Clayton Act, 15 U.S.C. §§ 12-27 (2000).
[43] ibid 41
[44] ibid 42

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copyright holder.[45] In one of the many instances, the Supreme Court ruled that anti-competitive provisions in licencing agreements limit consumer choice, thus being bad for the general welfare of the public, and goes against the Copyright Act's objectives for public policy.[46]

Patent Misuse has been long existing and recognised by the courts, and despite the similarities between copyrights and patents, it took time for courts to incorporate the same concepts to copyright. The *Lasercomb America, Inc. v. Reynolds'*[47] judgement represented a turning point as the Fourth Circuit undertook a thorough examination of how the theory of patent abuse developed in England as well as the United States, and went about to determine that because the goals of copyright and patent legislation are identical, copyright abuse principles should be used equally in copyright cases. Let us now briefly discuss the judicial interpretation on Copyright Misuse.

3.1.2 JUDICIARY ON COPYRIGHT MISUSE

The court has dealt with the conflict of Competition law and Copyright law in a few instances. Courts may apply antitrust concepts in copyright infringement cases to assess a defendant's affirmative copyright abuse defence. The claims for copyright abuse have arisen in different cases. The abuse of copyright by the copyright holder is limited only by their own imagination. Some of the most common ways of copyright abuse are when a copyright owner declined to grant a licence for its work, when it granted a licence with restrictions, and when it filed a lawsuit or threatened a lawsuit for infringement. In *Lasercomb America, Inc. v. Reynolds*[48], the copyright holder licenced its work under stringent terms and then brought a lawsuit against Reynolds in the US Court of Appeal, 4th Circuit, alleging copyright infringement.

A successful defence of copyright infringement prevents the plaintiff from succeeding in an action for violation of the misappropriated copyright. In this case of *Lasercomb America, Inc. v. Reynolds*[49], Lasercomb brought up an action against Holiday Steel for copyright infringement, breach of contract etc. Appellants contend that Lasercomb violated its copyright by adding restrictions in its standard licensing agreements that prohibit the licensee from participating in any way in the design of computer-assisted die-making software.[50] The US Court of Appeal, 4th Circuit held in this case that the copyright owners abused its copyright by adding a condition in licencing agreements stating that neither the licensee firm nor its executives, workers, and others may produce rival goods for the duration of the arrangement, which was ninety-nine years.

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[45] Copyright Misuse: A Shield against Accusations of Copyright Infringement - Law Firm WHGC Attorneys Newport Beach, California' (*WHGC, P.L.C. | FindLaw IM Template*) accessed 10 May 2022
[46] Broad. Music, Inc. v. Columbia Broad. System, Inc., 441 U.S. 1 (1979)
[47] Lasercomb America, Inc. v. Reynolds, 911 F.2d 970 (4th Cir. 1990)
[48] ibid.
[49] Ibid.
[50] Ramsey Hanna, 'Misusing Antitrust: The Search for Functional Copyright Misuse Standards' (1994) 46(2) Stanford Law Review 401, 448 https://www.jstor.org/stable/1229188.

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A similar Judgement was declared by the US Court of Appeal, Third Circuit in the case of *Video Pipeline, Inc. v. Buena Vista Home Entertainment*,[51] in which the subject matter in question was on-line display of "clip previews". Disney makes their trailers available online as well. It shows them on its own websites in order to attract and retain user traffic, and then uses this traffic as a tool to attract advertisers to advertise and sell additional items. Disney has also gone into arrangements with other companies to link their trailers. In the case of *United States v. Microsoft Corp*[52]., Microsoft offered the browser software without charge but practically banned the makers from installing any different browsers through its licensing clauses. Microsoft was accused by the authorities of breaking the Sherman Act by attaching its browser to the computer's operating system as an attempt to disrupt the competition in the market.[53]

In all of the above cases, it was alleged that the copyright owner had violated their rights. As it turns out, competition law has a lot of bearing on how a copyright lawsuit turns out. The goal of competition law is to guarantee free and open competition in the market. Yet, the lawmakers have determined that there shall be no competition in copyright law, at least while the copyright is still in effect. The law requires copyright owners to seek the aid of the courts in order to safeguard their rights, in contrast to how it treats other monopolists.

3.2 DISNEY: A CASE STUDY

Disney is a great example to demonstrate how copyright law can be used to monopolise markets. Disney owns copyright and trademark over all of its content that it produces. However, Disney's alleged abuse of dominant position in the market has been a point of contention for many years. Critics argue that the company's vast media and entertainment empire gives it an unfair advantage over competitors. For example, Disney's acquisition of 21st Century Fox gave it control over a significant portion of the movie and television industry, raising concerns about anti-competitive behavior.

Further, Disney has also faced criticism for its aggressive use of copyright law. The company has been known to pursue legal action against individuals and small businesses for using its intellectual property without permission, even in cases where the use is minimal or non-commercial. Disney's aggressive use of copyright law has stifled creativity and prevented individuals and small businesses from engaging in fair use.

The case study of Disney's alleged abuse of dominant position in the market and copyright law raises important questions about the role of large corporations in the media and entertainment industry. While Disney's dominance in the market and aggressive use of copyright law have allowed the company to protect its intellectual property and maintain its position as a media and entertainment powerhouse, it has also led to accusations of anti-competitive behavior and stifled creativity. As such, it is important for policymakers and

[51] Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc., 342 F.3d 191 (3d Cir. 2003).
[52] United States v. Microsoft Corp., 253 F.3d 34, 47 (D.C. Cir. 2001).
[53] Ibid.

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legal experts to carefully consider the balance between protecting intellectual property and promoting competition and fair use in the industry.[54]

3.3 THE HOLLYWOOD STUDIO SYSTEM: A CASE STUDY

Following World War One, the film business in the United States became centralised, with big studios managing both production and money, which in turn resulted in disruption of the competition in the market. This period is famously called as the Hollywood Studio era. During this period, the producers exercised a great deal of influence over practically every area of filmmaking. The distribution of films was mostly under the authority of five big studios and a few smaller ones, and the industry was heavily vertically integrated. An informal cartel of studios existed that competed for dominance yet worked together to rule the market. This situation continued until 1948 when the Supreme Court ordered for dismantling of the studio system by pronouncing an important precedent on vertical integration.

3.3.1 PARAMOUNT DECISION[55]

The paramount case involved the major Hollywood movie studios at the time, during the 1940's and before, which were accused of violating antitrust laws by engaging in monopolistic practices. These studios were called the "Big Five", and included the Metro-Goldwyn-Mayer, Paramount Pictures, Warner Bros. Pictures, 20th Century Fox, and RKO Radio Pictures. These studios were accused of engaging in what is known as vertical integration, which involves controlling different stages of the movie production process, from production to distribution to exhibition. The studios would use their control over distribution and exhibition to favor their own films over those of independent producers, thereby stifling competition in the industry. Finally, the Supreme Court ordered the studios to divest themselves of their theatre chains and end their vertical integration practices. This decision had significant implications for the movie industry, as it paved the way for greater competition and a more diverse range of films being produced and exhibited. Therefore, this case becomes a major precedent whale discussing the copyright and competition law interplay.

3.4 CONCLUSION

Comparing the Old Hollywood studio scenario to the current scenario in the movie industry, there might not be much differences. Even though today there is much more diversity and inclusion in today's time, the big movie corporations still hold an upper hand in the market. For instance, Netflix realised the market would vertically integrate and it would be impossible to licence material from potential rivals, and so it started producing original

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[54] Stoller M, 'Copyright, Antitrust, and Disney's Monopoly' (*Copyright, Antitrust, and Disney's Monopoly*, 12 November 2019) accessed 10 May 2023

[55] United States v. Paramount Pictures, Inc 334 U.S. 131 (1948)

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content. Copyright protection is the that form of IP protection that grants exclusive rights to the copyright holder. Thus, the Copyright Holder always holds a competitive advantage. The copyright holders may abuse their exclusive rights and it is more commonly known as 'copyright misuse'. Certain practices of copyright holders that constitutes a copyright misuse are a form of Abuse of dominant position. Over the past two decades, the balance of power in the copyright system has substantially tipped in favour of copyright owners. The extend of Copyright misuse is only limited by the copyright holder's imagination. Copyright protection through IP legislations is used to incentivise creativity. However, the abuse of copyright by the owners discourages creativity. Thus, to create balance in the copyright ecosystem and to achieve the objective of copyright legislation the state has to encourage policy decisions that are incentivising creativity and at the same time keep checks and balances i.e., the state has to create legislative guideline that has to be strictly followed to reduce the copyright misuse in any form.

Concerns regarding potential anti-competitive impacts are raised when competition policy concepts are applied to the CTEA. The use of copyright legislation should not unreasonably limit competition. However, by restricting access to works and preventing new entrants from utilising old material, the extension of copyright periods can result in market monopolies. Thus, such limitations can impede fair competition, restrict customer options, and discourage innovation in linked businesses.

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CHAPTER 4

BALANCING COPYRIGHT AND COMPETITION

Copyright laws grant creators exclusive rights to their original works, allowing them to control their creations regarding how they are used, reproduced, and distributed. While copyright protection is essential for incentivizing creativity and innovation, it can also create barriers to entry, limit competition, and restrict access to knowledge and cultural products.In order to identify a medium ground between preserving intellectual property rights through copyright legislation and promoting competition in the marketplace, it is necessary to examine various views and frameworks.

The Utilitarian theory, which is frequently linked to legal economic analysis, copyright should be created to maximise total societal benefit. It entails balancing the advantages of copyright protection with the drawbacks of diminished competition and lowered access. Finding the best protection level that fosters both competitiveness and innovation is the aim.[56] The user rights approach concentrates on ensuring that people have access to knowledge, information, and cultural goods. According to this viewpoint, copyright should be created with users' and customers' interests in mind.[57] Another viewpoint is that copyright is important for promoting development and innovation. It makes the case that strong copyright protection encourages creators to spend money on the production of new works. This idea acknowledges the necessity to strike a balance between exclusive rights and restrictions that permit follow-on innovation and the construction of new creative works on old ones.

To address copyright issues, several theories incorporate elements of competition law. They contend that copyright shouldn't be used to unfairly limit market competition. This strategy focuses on stopping anti-competitive behaviour, such the misuse of copyright to monopolise markets or hinder new competitors. Cultural variety, public interest, and democratic principles are all important factors in copyright legislation, according to this argument. It promotes a balance that guarantees access to cultural expressions, safeguards the public sphere, and promotes the free exchange of ideas and information.

These ideas offer several viewpoints on how to strike a compromise between copyright and competitive issues. These theories are frequently incorporated into copyright laws, regulations, and legal interpretations by policymakers, judges, and academics. The objective is to achieve a balance that fosters innovation, rewards creativity, fosters competition, and permits widespread access to knowledge and cultural items.

[56]Ibid 3.

[57] Schroff, S., 'The purpose of copyright—moving beyond the theory', Journal of Intellectual Property Law & Practice, vol. 16, no. 11, (2021), pp. 1262–1272

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4.1 APPLICABILITY OF THEORIES TO CTEA

The utilitarian approach to copyright and competition promotes maximizing all-around societal benefit. This viewpoint suggests that the CTEA's extension of copyright periods might be viewed as a strategy for encouraging artists and fostering creativity. The Act gives artists and content providers a longer time of exclusive rights by extending copyright periods, which can incentivize them to invest more in the production of new works. The drawbacks, may however, eventually exceed the advantages of this prolonged protection since it may limit public access to creative works and hinder competition.

The notion of access and user rights highlights the significance of ensuring that the general public has access to information and cultural goods. This argument can be demonstrated to be in contradiction with the CTEA's expanded copyright terms. The Act reduces the accessibility of works in the public domain and limits chances for derivative works, education, and research by extending copyright protection. This impedes innovation, the free exchange of ideas, and cultural advancement.[58]

The theory focusing on innovation and progress acknowledges the need for copyright protection to encourage inventors but also emphasises the need of restrictions to encourage follow-on innovation. The development of new works based on old ones may be hampered by the CTEA's prolonged copyright periods. It can make it difficult for artists to improve on earlier works, restricting originality and obstructing cultural advancement. To encourage both original creativity and later innovation, a balance between exclusive rights and constraints is essential.

The theory that places a strong emphasis on culture and the public good advocates for the protection of cultural variety, the public sphere, and the free exchange of ideas and information. These goals could be hindered by the CTEA's expansion of copyright periods. The Act limits the availability of cultural expressions by limiting access to works, possibly diminishing cultural legacy and impeding public conversation. The argument made by copyright law's detractors is that it should take into account larger social interests and make sure that public and cultural products are not unjustly restricted.[59]

Therefore, a detailed understanding of the ramifications of the Copyright Term Extension Act may be gained by examining the applicability of copyright and competition theories to this piece of legislation. The Act may support the utilitarian approach's objective of encouraging creativity, but it also raises questions about public interest, competitiveness, innovation, and knowledge availability. To establish a harmonic balance between defending intellectual property rights and promoting competition, innovation, and open access to cultural products, it is necessary to carefully weigh copyright and competition issues. These ideas should be

[58] Chapdelaine, P., 'Copyright User Rights and Remedies: An Access to Justice Perspective' (2018) 7 LAWS 1-26.
[59] Cohen, J.E., 'Creativity and Culture in Copyright Theory' (2007) 40 U.C. Davis L. Rev. 1151-1205.

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considered in copyright law policy talks to create a just and equitable balance that benefits both creators and society at large.

According to Epstein[60], by following a strict approach, the emphasis is on making sure that copyright laws and their expansions adhere to the constitutional framework and values, especially those that support competition and advancement in the arts and sciences. The rigorous approach places a focus on the necessity for a compelling argument and a close match between the mechanisms by which copyright laws are implemented and their intended purposes. According to Epstein, the CTEA does not adhere to this rigorous level of review. He contends that the legislation, which lengthens the lifetime of copyright protection, has a strong constitutional foundation and falls short of achieving its intended goal of advancing society.

He further contents that without a significant public advantage, the extension of copyright periods might result in an undue monopoly on creative works, stifle competition, restrict access to information, and ultimately impede advancement in the arts and sciences. Thus, the rigorous approach to copyright and competition is concerned with thoroughly assessing the validity of copyright laws and extensions, making sure that they are well-justified and serve the general public interest in fostering competition, advancement, and access to information.[61] The Copyright Term Extension Act, according to Epstein, does not adhere to this criteria.

It is difficult to see how the CTEA (Copyright Term Extension Act) actually helps achieve its stated goal of promoting progress in science and the arts. The balance of convenience seems to support the idea of getting rid of the CTEA. When using a very strict analysis, it raises even more questions about whether the means used by the CTEA align well with its intended goals. The goals need to be important, and the fit between the means and goals needs to be almost perfect. If the CTEA already appears weak when subject to a less strict analysis, it completely falls apart when subject to a very strict analysis, especially when applied to existing copyrights. Extending copyright protections cannot continue without a strong and fair exchange that benefits society.

4.2 LIMITATIONS TO COPYRIGHT THAT PROMOTE COMPETITION

4.2.2 LIMITED TERM

The limited term of copyright benefits competition in several ways. First off, it enables rivalry between many producers of the same work once the copyright expires. This rivalry may result in cheaper pricing and more options for customers. Second, it encourages brand rivalry by putting protected works up against those that are freely accessible in the public

[60] Epstein, R A, "The Dubious Constitutionality of the Copyright Term Extension Act" (2002) 36 Loyola of Los Angeles Law Review 123.
[61] ibid

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domain. Additionally, this may result in cheaper copyrighted book costs. Additionally encouraging competitiveness in the production of new works is the copyright's brief duration. When the copyright term is short, it forces authors to produce new works that are superior to or distinctive from earlier ones that are no longer protected by copyright. This promotes innovation and maintains market dynamism.[62] Unfortunately, the value of time constraints has diminished over time as copyright periods have become longer. These days, copyright periods can last more than a century, and it is seriously debatable whether the public benefits from such lengthy terms. Additionally, empirical research[63] have challenged the notion that longer copyright periods inevitably offer higher incentives for exploitation of older works.

4.2.2 MERGER DOCTRINE

The merger doctrine is a legal theory in American copyright law that tries to prevent anti-competitive effects of copyright protection. The idea of the idea-expression dichotomy, which distinguishes between fundamental concepts and particular manifestations of those ideas, is strongly related to this topic. The doctrine, however, takes this distinction a step further by taking into account the actual restrictions on expression. According to the merger doctrine, copyright protection may not be given to an otherwise protectable expression if there is only one or a very small number of ways to express a specific idea, or if other expressions are insufficient substitutes because of things like network effects or technical compatibility. In other words, the merger theory applies if the idea and its expression are so linked that defending the expression would essentially award exclusive rights over the idea itself. The merger doctrine's main goal is to stop the development of de facto monopoly over ideas, which can result in monopolistic control over markets. The merger doctrine encourages competition and guarantees that ideas continue to be available to the general public by restricting copyright protection in situations where there is a significant degree of similarity across manifestations because of the constraints of the concept.

According to this theory, certain ideas may only have a limited number of workable expressions, and providing copyright protection to just one of those representations could hinder competition and innovation in associated areas. The merger doctrine achieves a balance between encouraging creation and averting the potential harm of monopolistic control over ideas and their marketplaces by denying copyright protection in such situations.

4.2.3 FAIR USE

Fair use is a legal principle that permits users to do more than simply reproduce minor or inconsequential portions of a protected work. It allows people to utilise significant chunks of

[62] Katz, A, 'Commentary: Is collective administration of copyrights justified by the economic literature?' in Boyer, M, Trebilcock, M, and Vaver, D (eds), Competition Policy and Intellectual Property (Irwin Law, Toronto, 2009), pp. 449-468. [Online]. Available at: http://ssrn.com/abstract51001954 (accessed 25 may 2023).
[63] Heald, PJ, 'Property rights and the efficient exploitation of copyrighted works: an empirical analysis of public domain and copyrighted fiction bestsellers' (2007) Minnesota Law Review, 92, 1031-86.

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the work in circumstances when doing so would normally be against copyright laws. Fair usage has two primary goals. First, to reduce the authority of copyright holders by making them compete with legal copies generated without their consent. Because of the competition, pricing is kept fair and the copyright owner doesn't have total dominance over the market. Second, Fair usage also helps to prevent needless limitations on originality and innovation. It makes sure that the usage of copyright doesn't prevent other writers and users from modifying or using preexisting works to produce new creations.[64] Fair usage promotes ongoing advancement and development in the creative industry in this way.[65]

According to Fisher[66], fair use was first only justified in the economic analysis where there were particular market failures. For instance, if the expenses associated with locating the copyright owner, acquiring a licence, and upholding it were greater than the advantages it brought about. It was implied that if licencing technology or organisation were improved, fair use would no longer be essential and a licensing-based system would be preferable. Thoughts from more recent times[67], however, consider a broader understanding of market failures. It comprises mistakes that might result from strategic action, incomplete knowledge, disregard for the advantages or disadvantages of actions, or the inability to profit from certain external conditions. This means that fair usage may still be valuable and relevant even when licencing is an option. Therefore, fair use, in general, finds a compromise between defending the rights of copyright holders and enabling fair use of copyrighted works by others.

4.2.4 FIRST SALE DOCTRINE

The first sale doctrine permits borrowing and second-hand sales in order to compete with copyright owners. It guarantees that works protected by copyright may be freely marketed. Similar to fair use, the first sale concept helps to restrain the market dominance of copyright owners. It accomplishes this by permitting rivalry from used copies, borrowed copies, or less expensive parallel imports. This aids in minimising the detrimental impacts of monopoly pricing. By assuring that intellectual property may be freely utilised and sold without being constrained by copyright holders, the first sale concept also fosters long-term efficiency. The ultimate objective is to enable the free sale and reuse of intellectual property over time, even while short-term limitations between collaborating businesses may be permitted.[68]

[64] Gordon, WJ, 'Intellectual property as price discrimination: implications for contract' (1998) 73 Chicago–Kent Law Review 1367-1390.
[65] Ibid
[66]Fisher, WW, 'Reconstructing the fair use doctrine' (1987) 101 Harvard Law Review 1659, available at: http://cyber.law.harvard.edu/people/tfisher/IP/Fisher%20Fair%20Use%20Part%20V.pdf (accessed 2 May 2023).
[67]Frischmann, BM, and Lemley, MA, 'Spillovers' (2007) 107 Columbia Law Review 280.
[68] Katz, A, 'What antitrust law can (and cannot) teach about the first sale doctrine' (2012) available at: http://papers.ssrn.com/abstract=51845842 (accessed 7 May 2023).

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4.3 RECOMMENDATIONS

Patrick H. Haggerty[69] investigates several strategies for balancing the interests of the public and the interests of artists while fostering innovation and access to creative works. He suggests the following:
(i) Setting copyright duration based on the nature of work: This means to adjust the copyright duration in accordance with the nature of work. This method acknowledges that the protection and financial viability requirements for various types of creative works may vary. Shorter copyright periods, for instance, can be used for more commercial works with strong market demand, whereas longer periods might be allocated for works with important cultural or educational value or those that need more time to reach their target audience. This strategy tries to find a balance between rewarding artists and guaranteeing more public accessibility to their works.
(ii) Creating a public domain trust: A public domain trust should be established to manage the preservation and accessibility of works that are in the public domain. This trust would aim to protect copyright holders' rights while preserving access to works in the public domain. The trust could encourage the use of these works for a variety of reasons, including educational, artistic, and cultural endeavours, by actively administering and curating the public domain. This strategy aims to protect the public's potential to gain from creative works that are no longer constrained by copyright laws.
(iii) Promoting compulsory licensing: Granting licences to utilise intellectual works under certain guidelines while frequently requiring the payment of a set charge is known as compulsory licencing. With this strategy, the rights of copyright holders are balanced with the public's need for access to particular kinds of works. While guaranteeing that authors receive fair compensation, mandatory licencing might facilitate more usage of intellectual materials.

Haggerty aims to investigate potential answers that go beyond conventional copyright models by outlining these alternative strategies. In a rapidly developing digital age, his recommendations seek to solve the difficulties of promoting innovation and enhancing access to creative works while also taking creators' rights and interests into account.

Langvardt and Langvardt[70] propose a balanced copyright regime that fosters creation while defending the rights of the general public. A 50-year time frame after the author's passing would be a suitable limit on the copyright protection duration, allowing for a relatively smooth transition into the public domain. It tries to achieve a compromise between giving writers exclusive rights to encourage creative activity and making sure that works eventually become publicly available for the good of society by restricting the length. This idea is in line with the original goals of copyright legislation, which was created to give writers a restricted monopoly over their works in order to promote innovation and creativity.
A flexible legal principle known as "fair use" permits some uses of content that is protected by a copyright without the owner's express consent. By incorporating fair use within

[69] Ibid 4.
[70] Ibid 5.

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copyright law, courts can determine whether a specific use of copyrighted material meets the criteria for fair use based on elements such the use's purpose and character, the nature of the original work, the amount used, and the effect on the work's potential market.

Krystal E. Noga[71] seeks to give copyright owners a way to make money off of their creations while maintaining public access. This strategy proposes a potential way for owners of copyrights to make money off of their protected works without enforcing stringent control over usage. This process of turning an asset, like a copyright, into a tradable financial instrument, often in the form of securities, is referred to as securitization. Securitization in the context of copyrights refers to the development of financial products supported by potential future income streams from the works protected by copyright. Investors can then partake in the prospective income streams linked to the copyrights by purchasing and selling these financial products on the open market. Instead of depending simply on licencing agreements or having direct control over how the copyrighted material is used, the major goal of securitization is to give copyright holders the ability to monetize their works up front by selling the rights to future income. By doing this, owners of copyrights can make money immediately away and possibly attract more funding for their artistic endeavours. The public can also gain from securitization by guaranteeing that the copyrighted content is always accessible. Therefore, Securitization permits a more flexible approach than stringent control mechanisms that would restrict public use or demand permission for each use.

In order to determine the proper length of the copyright term, Michael Keyes[72] advocates for a realistic assessment of the returns accessible to copyright holders. Instead of only addressing the length of protection for creative works, Keyes contends that the primary focus should be on evaluating the likelihood of exploitation and the opportunity for appropriate profits. A realistic assessment of the possible profits available to copyright holders must be made rather than just relying on arbitrary extensions of copyright terms. The type of the creative work, market conditions, technological developments, and the financial realities of the creative industries should all be taken into account during this appraisal. This method also acknowledges that the financial worth of various creative works may vary and that prospective returns may change over time.

Vertical Dis-integration: The separation of several production or distribution phases within an industry is referred to as vertical disintegration. It increases decentralisation and promotes competitiveness in the market. Greater specialisation, creativity, and diversity in the development and dissemination of content are made possible by the independent operation of each level of the supply chain. The studio system served as a historical illustration of vertical integration's detrimental impacts in the film and television industries. The concentration of power in a small number of major studios hampered competition, constrained creative freedom, and prevented independent producers and content creators from accessing markets.

[71] Krystal E. Noga, 'Securitizing Copyrights: An Answer to the Sonny Bono Copyright Term Extension Act' (2007) 9 Tul J Tech & Intell Prop 1
[72] Ibid 11.

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Although this integrated system was damaged by measures like the Paramount Consent Decrees, and a more open and competitive market was made possible.

Therefore, the idea of vertical disintegration is presented as a way to combat the abuse of copyright monopolies and prevent the concentration of power by major players. Instead, a change towards a more fair and decentralised economy by eliminating vertical integration and enforcing forced licencing of content from companies with significant market power. By encouraging fair competition, innovation, and accessibility to a variety of content, this strategy strives to empower artists and audiences. In conclusion, vertical disintegration is essential for disrupting the power monopoly in the creative sector and ensuring a healthy and dynamic market. It promotes competition, creativity, and diversity while reducing the possibility of misuse of copyright monopolies by separating separate stages of production and delivery.

4.4 CONCLUSION

The passage of the Copyright Term Extension Act (CTEA) resulted in an additional 20 years of copyright protection, severely restricting people's ability to reproduce, and provoking a dispute between creators and the general public. The problem with copyright term extensions is that its impact on competition in the market by creating barriers to entry for new creators by restricting them to derive from existing copyrighted material. Big corporations such as Disney, for instance, have successfully safeguarded their characters under copyright law and profited from the additional protection provided by the CTEA, and have profited from state-authorized copyright monopolies to establish market dominance and possibly stifle competition in the entertainment sector.

The Supreme Court decision to determine whether the Copyright Extension Act is constitutional raise important concerns regarding the abuse of copyright laws to protect corporate interests and the potential effects on American competitiveness. Further, there is the necessity of reevaluating the ratio between copyright protection and open access to creative works, as it prompts worries about the misuse of copyright laws by powerful entities and the effects on creativity, innovation, and fair competition in the market. Thus, emphasises should be made on the significance of taking into account both legal and economic viewpoints in crafting copyright laws for the benefit of society as a whole by examining the effect of the Sonny Bono Copyright Extension Act on U.S. competition law.

It becomes clear that the concentration of power in the hands of a few studios hampered competition and originality by looking at the historical context of Hollywood's studio system and the following interventions by antitrust legislation. Vertical integration in the film and television industries was destroyed by the Paramount Consent Decrees, allowing for a more decentralised organisation that promoted the creation of diverse material and minimised conflicts of interest. However, vertical integration is currently on the rise again, led by businesses like Disney that want to control the streaming market. Similar to tactics that the

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Supreme Court has already ruled were unlawful, this method seeks to use copyright monopolies to achieve market power.

Scholars have suggested various recommendations in order to strike a balance between the interests of copyright owners and the general public. Haggerty's research into methods for balancing the interests of the general public and artists in promoting innovation and facilitating access to creative works has offered a number of different approaches to traditional copyright arrangements. These tactics include establishing a public domain trust, encouraging compulsory licencing, establishing copyright length dependent on the nature of the work, and supporting vertical disintegration. This is a more nuanced strategy that takes into account the various protection and commercial viability requirements of various creative works by altering the copyright period in accordance with the nature of the work. This plan tries to find a balance between compensating artists and making sure that the public can access their works.

Krystal E. Noga's proposal of securitization proposes making copyrights marketable financial instruments, enabling owners of copyrights to immediately monetize their creations by selling the rights to future income. This strategy guarantees ongoing public access to the copyrighted work while giving copyright holders quick cash gains and possibly attracting more financing for creative endeavours. When calculating the proper duration of copyright protection, Michael Keyes emphasises the significance of a realistic assessment of the prospective rewards for copyright holders. This method acknowledges that the monetary worth of creative works may change over time and takes into account the financial realities of the creative industries, market conditions, and technology advancements.

The idea of vertical disintegration is then put up as a way to stop dominant players from abusing their copyright monopolies and consolidating their dominance. Vertical disintegration encourages competition, innovation, and diversity within an industry by separating the manufacturing and distribution phases. By promoting a just and decentralised economy, this method strives to empower artists and viewers.

The problems with the current copyright system may be resolved by using these alternative strategies, which include modifying copyright duration in accordance with the nature of the work, establishing a public domain trust, encouraging compulsory licencing, investigating securitization, and arguing for vertical disintegration. These tactics acknowledge the significance of striking a balance between compensating creators fairly and ensuring that the public has access to cultural and educational works. In a fast changing digital landscape, they seek to encourage innovation, advance just pay, and amplify the voices of both producers and audiences.

Therefore, there is a pressing need to stop the abuse of copyright laws by large corporations looking to dominate and control the creative sector. A more equitable and dynamic market can develop by eliminating vertical integration and implementing fair licencing procedures, enabling both producers and viewers to interact freely and share creative works in a way that

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benefits both parties. Policymakers and stakeholders should strive towards a more inclusive and dynamic copyright framework that meets the interests of all parties by taking these alternative methods into consideration. We can encourage a creative ecology through these novel approaches. The necessity for a balanced strategy that protects copyright owners' rights while fostering competition and innovation is highlighted by the growing understanding of copyright misuse and the quest for suitable remedies. Legal regimes must continue to investigate and adjust in order to effectively handle copyright misuse, taking into consideration the shifting nature of technology, the creative industries, and international intellectual property frameworks.

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