

HOW TO SIDESTEP SAYING “SEE YA REAL SOON” TO THE PUBLIC DOMAIN: USING *DROIT D’AUTEUR* TO JUSTIFY A TRADEMARK-FAVORED TREATMENT OF MICKEY MOUSE

LAURA JACOBS*

Abstract: Mickey Mouse is one of the most recognizable characters in the world, but this famous character will be passing into the public domain when his copyright expires in 2024. The Walt Disney Company also has registered Mickey Mouse as a trademark. Thus, when Mickey passes into the public domain, an interesting conflict between copyright and trademark law will arise, and it is unclear which area of intellectual property law should determine the protections, if any, afforded to Mickey. France’s *droit d’auteur*, or “author’s rights,” offers a possible solution: when an author’s exploitation rights expire, the author’s moral rights continue to exist indefinitely, protecting the author from potential harmful uses of his or her creation. This scheme is similar to the way trademark law continues to protect trademarks so long as they are used in commerce. By marrying the concepts, trademark law would have a basis to supersede copyright’s public domain. Although there would be restrictions to prevent goodwill-damaging uses, the various trademark defenses would remain available to public domain users. Thus, allowing trademark law to govern in the public domain would encourage derivative works and thriving creativity while still protecting goodwill for generations to come.

INTRODUCTION

“I only hope we never lose sight of one thing—that it was all started by a mouse.”¹ It is hard not to affiliate the Walt Disney Company (TWDC), a multi-billion dollar corporation, with its iconic symbol, Mickey Mouse.² Neverthe-

* Laura Jacobs is Managing Editor of the *Boston College International & Comparative Law Review*.

¹ Laurie Ulster, *Happy Birthday, Mickey Mouse! A Look at the Mouse That Built an Empire*, BIO (Nov. 18, 2014), <http://www.biography.com/news/mickey-mouse-history> [<https://perma.cc/XX89-QFCN>] (quoting Walt Disney).

² See Joseph P. Liu, *The New Public Domain*, 2013 U. ILL. L. REV. 1395, 1429–33; *Could Oswald the Lucky Rabbit Have Been Bigger Than Mickey?*, BBC (Dec. 3, 2012, 5:21 PM), <http://www.bbc.com/news/magazine-19910825> [<https://perma.cc/8QM9-PU77>] [hereinafter *Oswald*, BBC]; *Disney Stock Information*, WALT DISNEY CO., <http://thewaltdisneycompany.com/investors/disney->

less, we may be forced to do just that in 2024 when Mickey's copyright expires and the character passes into the public domain.³ Once this occurs, anyone will be free to use the original image of Mickey Mouse in movies, merchandise, novels, and other media without legal repercussions.⁴ But is this the right result? Under U.S. copyright law, works produced before 1978 are protected for a term of ninety-five years; once that period has expired, a work passes into the public domain, making it available for anyone to use.⁵ This concept of limited protection has deep roots: it is enshrined in the Copyright Clause of the U.S. Constitution, which guarantees creators protection of their works but only for "limited Times."⁶

Nearly all countries employ some form of copyright protection, but many recognize these rights in different ways.⁷ France's legal principle of *droit d'auteur*, for example, gives a creator perpetual protection of his or her work—a right derived from the belief that the creator's own personality is both embedded in and expressed through his or her work.⁸ The concept of *droit d'auteur* bears similarities to both domestic and international trademark law in that it recognizes potentially perpetual rights to trademarked symbols.⁹ As long as the trademarked symbol is used to identify the source of a work or good, it is protected against uses that could cause consumer confusion or dilute the reputation of the symbol.¹⁰ This element of trademark doctrine has striking similarities to France's *droit d'auteur*, which views the created symbol as a part of the owner's personhood; the law seeks to prevent the abuse or misuse

stock [<https://perma.cc/ET2W-DYT4>] (last visited Apr. 9, 2016); Claire Suddath, *A Brief History of Mickey Mouse*, TIME (Nov. 18, 2008), <http://content.time.com/time/arts/article/0,8599,1859935,00.html> [<https://perma.cc/Z8P9-JLKY>]; Ulster, *supra* note 1.

³ See Liu, *supra* note 2, at 1408.

⁴ See *id.* at 1396–97.

⁵ See Copyright Term Extension Act of 1998, 17 U.S.C. § 304(b) (2012) (pertaining to copyrights in their renewal term as of October 27, 1998).

⁶ See U.S. CONST. art. I, § 8, cl. 8.

⁷ See ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 5 (6th ed. 2012); Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 991 (1990); Chidi Oguamanam, *Beyond Theories: Intellectual Property Dynamics in the Global Knowledge Economy*, 9 WAKE FOREST INTELL. PROP. L.J. 104, 108–09 (2009).

⁸ See Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 7 (1997); William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 168 (Stephen R. Munzer ed., 2001); Oguamanam, *supra* note 7, at 108–09; Jean-Luc Piotraut, *An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 551 (2006) (quoting Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1, 3 (1980)).

⁹ See MERGES ET AL., *supra* note 7, at 985–89; Liu, *supra* note 2, at 1427–28.

¹⁰ See Liu, *supra* note 2, at 1428.

of the symbol in a way that could be attributed inappropriately back to the owner.¹¹

When a creation has a dual status, an interesting conflict between copyright and trademark law arises.¹² Although Mickey Mouse originated as a copyright, both his name and his image grew to be a very prominent trademarked symbol of TWDC.¹³ In theory, when he enters the public domain, Mickey Mouse still will be registered as a trademark to TWDC, yet the public may have free reign in how it uses his image in its creations—potentially damaging the family-friendly reputation of TWDC.¹⁴

Should Mickey be given special copyright protection similar to that of *droit d'auteur*? Does the overlap between copyright and trademark cover the conflict between the international theories? This Note attempts to address these issues in three parts. Part I provides a background of the dominant theories of intellectual property law in both the United States and continental Europe. It also provides a brief history of Mickey Mouse's origin. Part II compares U.S. copyright law to *droit d'auteur*. Additionally, it discusses the differences and overlap between U.S. copyright and trademark laws and their effects on the dual symbol and character of Mickey Mouse. Part III recommends that the U.S. intellectual property system view Mickey Mouse's unique position through the lens of trademark law, allowing the moral rights and personhood of TWDC to be protected in a manner similar to the rights afforded under *droit d'auteur*.

I. BACKGROUND

Protection for tangible property is more easily conceptualized and rationalized than protection of intangible intellectual property.¹⁵ One of the primary reasons for an owner to protect his or her physical property is to preserve the property's value.¹⁶ Intellectual property differs because the value of intangible

¹¹ See Cotter, *supra* note 8, at 7, 12; Fisher, *supra* note 8, at 168; Oguamanam, *supra* note 7, at 108–09.

¹² See Kathryn M. Foley, Note, *Protecting Fictional Characters: Defining the Elusive Trademark-Copyright Divide*, 41 CONN. L. REV. 921, 954–55 (2009); Liu, *supra* note 2, at 1427–28.

¹³ See Liu, *supra* note 2, at 1427; *Trademark Electronic Search System*, U.S. PAT. & TRADEMARK OFF., <http://tess2.uspto.gov/> [<https://perma.cc/ZE3R-AUPC>] (select “Word and/or Design Mark Search (Free Form),” search the term “(03.09.06)[DD] and (Live)[LD] and (Disney)[ALL]”) [hereinafter *TESS*]; *TMVIEW*, <https://www.tmdn.org/tmview/welcome.html> [<https://perma.cc/2P8Q-53FY>] (search “Mickey Mouse”) (showing various international registrations of Mickey Mouse); see also Keith Gluck, *The Birth of a Mouse*, THE WALT DISNEY FAMILY MUSEUM (Nov. 18, 2012), <http://www.waltdisney.org/blog/birth-mouse> [<https://perma.cc/38NF-RPR6>]; Suddath, *supra* note 2; Ulster, *supra* note 1.

¹⁴ See Cotter, *supra* note 8, at 7; Liu, *supra* note 2, at 1427–28.

¹⁵ See MERGES ET AL., *supra* note 7, at 5.

¹⁶ See *id.*

ideas is not so easily diminished.¹⁷ Multiple people in different places can use and enjoy the knowledge conveyed through intellectual property without decreasing its value.¹⁸ Thus, the protection of such useful ideas cannot be vindicated using the same economic reasons that a physical property owner would use.¹⁹ Instead, multiple theories have been developed to justify protecting intellectual property.²⁰

A. *The American Way*

The most prominent theory justifying the protection of intellectual property in the United States is the utilitarian, or economic incentive, theory.²¹ The U.S. Constitution, as well as judicial decisions interpreting sources of intellectual property law, has primarily used the utilitarian theory to justify U.S. intellectual property laws.²² The utilitarian theory suggests that the best way to “promote the Progress of Science and useful Arts,” the goal outlined in the Constitution’s Copyright Clause, is to grant a creator an exclusive right to his works for a limited time.²³ Without some form of an incentive to create, the theory reasons that creativity and inventiveness would slow, if not stop altogether.²⁴ For example, a person could appropriate a competitor’s information and disseminate it before the competitor is able to recoup their investment costs.²⁵ The economic incentive theory prevents this, allowing the creator to recover his or her costs and encouraging the creator to continue to innovate and create.²⁶

Though it is widely accepted, the utilitarian theory also poses problems.²⁷ First, an incentive system promotes secrecy and exclusion in the name of innovation.²⁸ Critics of the utilitarian theory argue that allowing a creator to possess the exclusive right to his or her expression of an original idea grants the creator

¹⁷ *See id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See id.* at 11; Fisher, *supra* note 8, at 168.

²² U.S. CONST. art. I, § 8, cl. 8 (“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 . . .”); *see MERGES ET AL., supra* note 7, at 11; Fisher, *supra* note 8, at 168.

²³ U.S. CONST. art. I, § 8, cl. 8; *see MERGES ET AL., supra* note 7, at 11–12.

²⁴ *See Oguamanam, supra* note 7, at 118–19.

²⁵ *See MERGES ET AL., supra* note 7, at 12–14. Imagine that a playwright creates a play that speaks to a generation. *See id.* at 12–13. After the opening night, someone records it and posts it on YouTube for the entire world to see. *See id.* Because it is now available for free, it is very unlikely that the playwright will be able to recover the costs of creating and staging the play. *See id.* In theory, the playwright as well as others would leave the market and cause an underproduction of creative works. *See id.*

²⁶ *See id.* at 12.

²⁷ *See id.* at 14–16; Oguamanam, *supra* note 7, at 118–28.

²⁸ *See MERGES ET AL., supra* note 7, at 14–16; Oguamanam, *supra* note 7, at 121.

a monopoly in an economic market.²⁹ U.S. law, however, offsets these costs by limiting the duration and extent of an owner's exclusive rights.³⁰

Critics also point out that many civilizations have enjoyed creativity and innovation without a conventional intellectual property system.³¹ This is evident from the fact that many meaningful works are published through forms of public subsidy and do not provide the creator with much economic reward.³² Thus, the theory's assumed link between creativity and economic incentive may not be particularly strong.³³

B. The French *Droit Moral*

In contrast to the U.S. economic incentive theory, continental Europe uses noneconomic theories to justify its intellectual property laws.³⁴ The French system is called *droit d'auteur*, or "author's rights."³⁵ *Droit d'auteur* "is a concept far broader than American copyright . . . French law purports to protect the author's intellectual and moral interests" in addition to his or her economic interests.³⁶ Thus, the French include the idea of *droit moral*, or "moral rights," in their laws, a concept that was eventually adopted by the rest of continental Europe and is still a dominant theory of European intellectual property rights today.³⁷

One of the contributing theories to *droit moral* is the natural law of property, or the labor-desert theory.³⁸ John Locke reasoned that individuals owned the "fruits of their labor" because they owned their own bodies.³⁹ Following this concept, it seems logical that a creator would own the expression of ideas from his or her own mind.⁴⁰ This theory was so compelling that remnants of it

²⁹ MERGES ET AL., *supra* note 7, at 14 (explaining that monopolistic behavior is one of the many dangerous economic practices from which American antitrust laws protect consumers).

³⁰ *Id.*

³¹ Oguamanam, *supra* note 7, at 119 (pointing to Imperial China and the Arab world among others).

³² *Id.* at 120–21. "For instance, many authoritative university publishers operate on one form of subsidy or another. Academic writings that make significant contributions to knowledge and innovation hardly earn any viable royalties." *Id.* at 120 n.62.

³³ *Id.* at 118 (quoting IKECHI MGBEOJI, GLOBAL BIOPIRACY: PATENTS, PLANTS, AND INDIGENOUS KNOWLEDGE 21 (2006)).

³⁴ See MERGES ET AL., *supra* note 7, at 5; Ginsburg, *supra* note 7, at 991; Oguamanam, *supra* note 7, at 108–09.

³⁵ See Piotraut, *supra* note 8, at 551.

³⁶ *Id.* (quoting DaSilva, *supra* note 8, at 3).

³⁷ Cotter, *supra* note 8, at 5; see also Fisher, *supra* note 8, at 168.

³⁸ See Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 523 (1990).

³⁹ JOHN LOCKE, *Concerning the True and Original Extent and End of Civil Government*, in TWO TREATISES OF GOVERNMENT § 27 (1689).

⁴⁰ Yen, *supra* note 38, at 537. Robert Merges believes that the labor theory does work well for intellectual property law: "The creator of a new work claims property not by virtue of contributing

are still found in U.S. intellectual property law.⁴¹ For example, academic papers are still protected under U.S. copyright laws even though there is not necessarily an economic incentive to create the work.⁴² Using natural law as a justification for intellectual property protection becomes problematic, however, when determining how far a creator's rights extend—perhaps one reason why it has fallen out of favor in U.S. jurisprudence.⁴³

The more dominant rationale for *droit moral*, however, finds its foundation in Kantian and Hegelian philosophy.⁴⁴ These concepts—termed the “personality theory” of intellectual property—give a creator a unique bundle of rights on the basis that his or her creation is a manifestation of his or her own personality.⁴⁵ These moral rights can be boiled down to four key aspects:

the *droit de divulgation*, or right of disclosure; the *droit de repentir ou de retrait*, or right to correct or withdraw works previously disclosed to the public; the *droit de paternité*, or right of attribution; and the *droit au respect de l'œuvre*, literally “the right to respect of the work,” usually translated as the right of integrity.⁴⁶

Of the four, the rights of attribution and integrity are deemed the most important and are expressly imprescriptible, meaning they cannot expire through the passage of time or non-use.⁴⁷ The right of attribution concerns whether a work is misattributed, is not credited at all, or is attributed anonymously or pseudonymously.⁴⁸ In essence, the creator has a right to either be associated or disconnected from his or her work at his or her own will.⁴⁹ The right of integrity, in its simplest terms, is the protection given to a creator's work so that misuse or abuse of the work by others does not harm the creator's reputation.⁵⁰ The right, however, can be so expansive as to include any misrep-

some new *thing* to a preexisting thing, but to the transformation of the preexisting thing by the expenditure of labor.” ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 15 (2011).

⁴¹ See Yen, *supra* note 38, at 531.

⁴² *Id.* at 537. Yen also gives other copyrightable examples of “the results of accidents and products which the government requires public utilities to print.” *Id.*

⁴³ See MERGES ET AL., *supra* note 7, at 4.

⁴⁴ Cotter, *supra* note 8, at 7; Fisher, *supra* note 8, at 168.

⁴⁵ See Cotter, *supra* note 8, at 7; Fisher, *supra* note 8, at 168; Oguamanam, *supra* note 7, at 108–09.

⁴⁶ Cotter, *supra* note 8, at 10–11 (emphasis added).

⁴⁷ *Id.* at 12; see ELIZABETH ADENEY, THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS 169 (2006); Lior Zemer, *Moral Rights: Limited Edition*, 91 B.U. L. REV. 1519, 1524 (2011).

⁴⁸ Cotter, *supra* note 8, at 12; see ADENEY, *supra* note 47, at 179–80.

⁴⁹ See ADENEY, *supra* note 47, at 179–80; Cotter, *supra* note 8, at 12.

⁵⁰ Cotter, *supra* note 8, at 13; see ADENEY, *supra* note 47, at 181–83.

resentation that contradicts the creator's "intellectual interests, personal style, or literary, artistic[,] or scientific conceptions."⁵¹

Opponents to the personhood theories argue that a work is not a product of the creator's personality, but rather a product of the society in which the creator lives.⁵² Additionally, it is unclear whether or how a creator's investment in his or her work can be measured or considered.⁵³ Should a project into which the creator put numerous years of work and effort receive more protection than an accidental discovery?⁵⁴ Finally, others question how consumers' rights and personalities are recognized through this theory.⁵⁵

C. *It All Started with a Rabbit?*

As some are surprised to discover, Mickey Mouse was not Walt Disney's first original creation; Walt Disney's story actually begins with Oswald the Lucky Rabbit.⁵⁶ In 1927, Universal Pictures contracted Disney and his team to produce twenty-six original cartoons featuring Disney's original character, Oswald the Lucky Rabbit.⁵⁷ The Oswald cartoons were a great success.⁵⁸ When Disney went to renegotiate his contract the following year, Universal Pictures demanded he take a pay cut.⁵⁹ Upon his refusal, Universal revealed that it owned the copyright to Oswald and had secretly contracted most of Disney's animation team to work exclusively for it.⁶⁰ In a desperate attempt to save the Disney Brothers Studio, during his train ride back to California Disney created the initial sketch of Mortimer Mouse.⁶¹ At his wife's insistence, Disney changed the name from Mortimer to Mickey, and the legend was born.⁶² On November 18, 1928, "Steamboat Willie," featuring Mickey Mouse, was released as the first animation to include synchronized music and sound effects.⁶³

⁵¹ Cotter, *supra* note 8, at 13 (quoting Neil Weinstock Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 387 (1993)); see ADENEY, *supra* note 47, at 181–83.

⁵² MERGES ET AL., *supra* note 7, at 10.

⁵³ *Id.* at 9.

⁵⁴ *Id.*

⁵⁵ *Id.* at 10.

⁵⁶ See *Oswald*, BBC, *supra* note 2; Suddath, *supra* note 2; Ulster, *supra* note 1.

⁵⁷ See *Oswald*, BBC, *supra* note 2; Suddath, *supra* note 2; Ulster, *supra* note 1.

⁵⁸ See Gluck, *supra* note 13; *Oswald*, BBC, *supra* note 2.

⁵⁹ See *Oswald*, BBC, *supra* note 2; Suddath, *supra* note 2.

⁶⁰ See Gluck, *supra* note 13; *Oswald*, BBC, *supra* note 2; Suddath, *supra* note 2; Ulster, *supra* note 1.

⁶¹ See Gluck, *supra* note 13; Suddath, *supra* note 2; Ulster, *supra* note 1.

⁶² See Gluck, *supra* note 13; Suddath, *supra* note 2; Ulster, *supra* note 1.

⁶³ See Gluck, *supra* note 13; Suddath, *supra* note 2; Ulster, *supra* note 1.

Since then, Mickey has evolved in style and has risen to be one of the most famous mascots in the world.⁶⁴

II. DISCUSSION

In the United States, Mickey is subject to both copyright and trademark laws.⁶⁵ The overlap between the two areas could help determine the fate of Mickey Mouse once he enters the public domain in 2024.⁶⁶ Additionally, evaluating the way works are treated in France demonstrates that the areas of overlap between trademark and copyright are fertile ground for continued protection of one of the world's most famous characters.⁶⁷

A. Copyright vs. Trademark

Like many other fictional characters, Mickey Mouse is subject to both copyright and trademark laws.⁶⁸ When a creation is copyrighted, the author has a monopoly on its use for a limited time.⁶⁹ On the other hand, trademark law allows the owner to use his monopoly rights perpetually in order to avoid consumer confusion.⁷⁰ A conflict between these two areas of intellectual property law arises when a copyrighted work enters the public domain yet is still protected under trademark law.⁷¹

1. Copyright Law

Copyright laws in the United States allow the author to protect his “original work[] of authorship” so long as it is “fixed in any tangible medium of expression.”⁷² Under copyright protection, the author has the exclusive right to use or license a variety of rights.⁷³ For example, he or she may reproduce the

⁶⁴ See Gluck, *supra* note 13; *Marketing Evolution of Mickey Mouse and Disney*, OSTER & ASSOCIATES (July 17, 2014), <http://osterads.com/post/the-marketing-evolution-of-mickey-mouse-and-disney/143> [<https://perma.cc/REE5-Y3SL>] [hereinafter *Marketing Evolution*]; *Mickey, The Universal Icon*, PEOPALOVE BRANDTALK, <http://www.peopalove.com/brandtalk/2010/dec/wanted.html> [<https://perma.cc/LH9Z-LY8D>]; Suddath, *supra* note 2; Ulster, *supra* note 1.

⁶⁵ See Liu, *supra* note 2, at 1428.

⁶⁶ See *id.*

⁶⁷ See SILKE VON LEWINSKI, INTERNATIONAL COPYRIGHT LAW AND POLICY 45–46 (2008); Foley, *supra* note 12, at 960–61; Michael Todd Helfand, Note, *When Mickey Mouse Is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters*, 44 STAN. L. REV. 623, 627 (1992); Liu, *supra* note 2, at 1428, 1430, 1433; Piotraut, *supra* note 8, at 558, 565, 567–69.

⁶⁸ See Liu, *supra* note 2, at 1428.

⁶⁹ See Christine Nickles, *The Conflicts Between Intellectual Property Protections When a Character Enters the Public Domain*, 7 UCLA ENT. L. REV. 133, 134 (1999).

⁷⁰ See Foley, *supra* note 12, at 940; Nickles, *supra* note 69, at 134, 158.

⁷¹ See Liu, *supra* note 2, at 1424, 1428; Nickles, *supra* note 69, at 134.

⁷² 17 U.S.C. § 102(a) (2012).

⁷³ *Id.* § 106.

work, sell the reproduction, or perform and display the work publicly.⁷⁴ Additionally, he or she can create derivative works based on the original work.⁷⁵ Thus, TWDC is the only entity that can use Mickey Mouse in order to create new derivative works based on the original “Steamboat Willie.”⁷⁶

These protections and rights, however, are not perpetual; the U.S. Constitution specifically provides that protection lasts only for “limited Times.”⁷⁷ Congress has changed its interpretation of this constitutional language over the past century.⁷⁸ Mickey Mouse was originally protected under the Copyright Act of 1909 and consequently, had an original copyright duration of twenty-eight years plus a twenty-eight year renewal.⁷⁹ After the 1976 Copyright Act took effect, all surviving copyrights from the 1909 Act had their renewal period extended to forty-seven years.⁸⁰ Accordingly, under the 1976 legislation, Mickey Mouse was scheduled to enter the public domain in 2004.⁸¹ In 1998, extensive lobbying by TWDC and many other expiring copyright owners led to the Copyright Term Extension Act (CTEA).⁸² The CTEA extended the life of all existing copyrights by twenty years.⁸³

The extension of copyright durations has caused considerable backlash from proponents of the public domain.⁸⁴ In *Eldred v. Ashcroft*, the constitutionality of the CTEA was challenged.⁸⁵ The petitioners did not object to the new term limit set by the CTEA; instead, they questioned the constitutionality of the extension of the existing copyright durations.⁸⁶ They argued that Congress violated the First Amendment and the “limited Times” portion of the Copyright Clause by extending the duration of existing copyrights.⁸⁷ The Supreme Court, however, determined that Congress did not exceed its constitutional limita-

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *See id.*

⁷⁷ U.S. CONST. art. I, § 8, cl. 8.

⁷⁸ *See* 17 U.S.C. § 301; MERGES ET AL., *supra* note 7, at 530.

⁷⁹ *See* MERGES ET AL., *supra* note 7, at 526–27; Gluck, *supra* note 13; Suddath, *supra* note 2; Ulster, *supra* note 1.

⁸⁰ MERGES ET AL., *supra* note 7, at 527; Arlen W. Langvardt & Kyle T. Langvardt, *Unwise or Unconstitutional?: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit*, 5 MINN. J.L. SCI. & TECH. 193, 200 (2004).

⁸¹ MERGES ET AL., *supra* note 7, at 527; Liu, *supra* note 2, at 1408; *see* Gluck, *supra* note 13; Suddath, *supra* note 2; Ulster, *supra* note 1.

⁸² MERGES ET AL., *supra* note 7, at 527; Langvardt & Langvardt, *supra* note 80, at 237–38; Liu, *supra* note 2, at 1425–26.

⁸³ 17 U.S.C. § 304(b); MERGES ET AL., *supra* note 7, at 527.

⁸⁴ *See generally* Langvardt & Langvardt, *supra* note 80 (calling the constitutionality and necessity of the CTEA into question); Liu, *supra* note 2 (pointing to critiques regarding the CTEA’s constitutionality and effect on the U.S. economic incentive theory-based system).

⁸⁵ 537 U.S. 186, 193 (2003).

⁸⁶ *Id.*

⁸⁷ *Id.* at 193–94.

tions.⁸⁸ In fact, the Court stated that one of Congress's key reasons for adopting the extension was a European Union Directive, which extended European copyright durations and would deny reciprocity to non-EU countries with shorter durations.⁸⁹ Therefore, Congress was ensuring that U.S. authors would receive the same protection for their works in other countries and was incentivizing foreign authors to distribute their works in the United States.⁹⁰ Further, Congress's decision was not unprecedented: the 1976 Copyright Act was enacted in response to the discrepancies between the 1909 Act and the Berne Convention.⁹¹ Because the Court found that Congress had a rational basis for its legislation, it did not find a violation of the Copyright Clause.⁹² Additionally, the Court found that the close temporal proximity of the adoption of the Copyright Clause and the First Amendment demonstrated that "copyright's limited monopolies are compatible with free speech principles."⁹³ Moreover, the Court pointed out, copyright law has built-in limitations and safeguards against abuse to protect First Amendment rights.⁹⁴ Thus, the CTEA and its extension of the previously existing copyrights were deemed constitutional.⁹⁵

As the *Eldred* Court's discussion emphasizes, duration is not the only limitation on copyright protection.⁹⁶ For example, copyright protection does not "extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery."⁹⁷ Thus, "Steamboat Willie," the cartoon in which Mickey Mouse debuted, is protectable by copyright, but the idea of an animated cartoon with synchronized sound featuring an animal character could be used by anyone.⁹⁸ Additionally, there are numerous defenses available against copyright violations, such as the fair-use doctrine.⁹⁹ The fair-use doctrine per-

⁸⁸ *Id.* at 194.

⁸⁹ *Id.* at 205–06. The referenced Directive is Council Directive 93/98/EEC, 1993 O.J. (L 290) 9–13 (EC).

⁹⁰ *Eldred*, 537 U.S. at 205–06.

⁹¹ *Id.* The Berne Convention for the Protection of Literary and Artistic Works sets the minimum requirements of international copyright protection. See generally Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 1161 U.N.T.S. 3 [hereinafter Berne Convention]. Authors of signatory states receive reciprocal treatment in each member nation. See *id.* The United States did not become a party to the Berne Convention until 1989. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988); MERGES ET AL., *supra* note 7, at 743.

⁹² *Eldred*, 537 U.S. at 205–06.

⁹³ *Id.* at 219.

⁹⁴ *Id.* at 219–20.

⁹⁵ *Id.* at 221–22.

⁹⁶ See 17 U.S.C. §§ 102(b), 107; *Eldred*, 537 U.S. at 219–20.

⁹⁷ 17 U.S.C. § 102(b).

⁹⁸ See 17 U.S.C. § 102. See generally *Baker v. Selden*, 101 U.S. 99 (1879) (holding copyright law only protects expression and not the ideas themselves); *Lotus Dev. Corp. v. Borland Int'l*, 49 F.3d 807 (1st Cir. 1995), *aff'd*, 516 U.S. 233 (1996) (holding methods of operation cannot be protected by copyright law).

⁹⁹ 17 U.S.C. § 107.

mits the use of a copied work that would otherwise infringe on the copyright when the work is used “for purposes such as criticism, comment, news reporting, teaching[,] . . . scholarship, or research.”¹⁰⁰

2. Trademark Law

Trademark law similarly allows the owner a monopoly on “any word, name, symbol, or device, or any combination thereof.”¹⁰¹ A character, such as Mickey Mouse, would often fall under the “combination” category because he consists of both a name and a symbol.¹⁰² This monopoly allows the owner to use the character in conjunction with particular goods so long as the trademark is registered.¹⁰³ Similar to derivative works in copyright, trademark also allows for a zone of expansion.¹⁰⁴ If the expanded goods are sufficiently related to the registered goods, the trademark is still valid and will cover the expanded goods as well.¹⁰⁵ Unlike copyrights, however, trademarks must be registered in order to receive full legal protection under the Lanham Act.¹⁰⁶

Trademark also differs from copyright in that it can potentially have a perpetual duration.¹⁰⁷ The purpose of a trademark is to prevent consumer confusion.¹⁰⁸ Consumers begin to affiliate a trademark with a particular level of quality, allowing the owner to develop goodwill.¹⁰⁹ If another entity begins using the trademark on a product that does not meet consumer expectations, the owner’s goodwill and reputation could be damaged.¹¹⁰ In a sense, the trademark becomes entwined with the identity of the owner in the eyes of the consumer.¹¹¹ Thus, a trademark is protected so long as the trademark is used in commerce to distinguish a product and identify its source.¹¹²

¹⁰⁰ *Id.*

¹⁰¹ 15 U.S.C. § 1127 (2012); see Nickles, *supra* note 69, at 156.

¹⁰² Nickles, *supra* note 69, at 156. Mickey Mouse is registered in a variety of forms, including his name and various versions of his image. *TESS*, *supra* note 13.

¹⁰³ See Nickles, *supra* note 69, at 156.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* The image of Mickey Mouse is registered for a wide variety of goods, thus TWDC can ensure that all subsequent products fall within the zone of expansion. See *id.*; *TESS*, *supra* note 13.

¹⁰⁶ See 15 U.S.C. §§ 1111, 1114, 1116–1118, 1125; Nickles, *supra* note 69, at 156. The Lanham Act is the current legislation that controls trademark law in the United States. *MERGES ET AL.*, *supra* note 7, at 764.

¹⁰⁷ See 15 U.S.C. § 1127; Liu, *supra* note 2, at 1427; Nickles, *supra* note 69, at 156.

¹⁰⁸ *MERGES ET AL.*, *supra* note 7, at 765; Nickles, *supra* note 69, at 156.

¹⁰⁹ *MERGES ET AL.*, *supra* note 7, at 766–68; Foley, *supra* note 12, at 939; Nickles, *supra* note 69, at 156–57.

¹¹⁰ *MERGES ET AL.*, *supra* note 7, at 766–68; Foley, *supra* note 12, at 939; Nickles, *supra* note 69, at 156–57.

¹¹¹ See Foley, *supra* note 12, at 941.

¹¹² 15 U.S.C. §§ 1058, 1127; Liu, *supra* note 2, at 1427; Nickles, *supra* note 69, at 156.

Like copyrights, trademarks are restrained by limitations and defenses.¹¹³ Under the Lanham Act, which provides full legal protection of registered trademarks, the trademark cannot be protected if it has been abandoned.¹¹⁴ Abandonment occurs when either the owner stops using the symbol without demonstrated intent to reuse it or the trademark has become associated as the generic term for a product.¹¹⁵ In both of these situations, the consumer no longer affiliates the trademark with the owner, and another's use of the trademark would not damage the owner's goodwill.¹¹⁶ Additionally, if a third party can prove that use of a trademark would not cause consumer confusion, no trademark violation will be found.¹¹⁷

3. The Intersection of Copyright and Trademark Law

Even though a copyright may protect a particular character, trademark law simultaneously may limit some fair-use defenses to the copyright protection on that character.¹¹⁸ Once the copyrighted character enters the public domain, however, even more significant overlap may cause problems for those who try to use the character.¹¹⁹ In theory, the two areas of law are distinct, but in practice, the line is not so clear.¹²⁰ The muddling of the line between copyright and trademark law primarily occurs in three types of claims: confusion claims, merchandising claims, and dilution claims.¹²¹

First, confusion claims arise naturally in trademark infringement cases.¹²² Trademark owners claim that consumers have come to identify the formerly copyrighted work closely with the owner's identity.¹²³ The case law in this area provides no clear answer as to where trademark protection ends and the public domain begins.¹²⁴ In certain situations, the courts have tried to slow the expanding territory of copyright.¹²⁵ Yet, other cases have acknowledged that some characters have "universal recognition," "widespread popularity," and

¹¹³ See 15 U.S.C. §§ 1125, 1127; Foley, *supra* note 12, at 940, 946–47; Liu, *supra* note 2, at 1428.

¹¹⁴ 15 U.S.C. § 1127.

¹¹⁵ *Id.*; see MERGES ET AL., *supra* note 7, at 794 (describing "genericide" as the process in which a trademarked name becomes generic over time).

¹¹⁶ See MERGES ET AL., *supra* note 7, at 766–68, 794–96; Foley, *supra* note 12, at 939; Nickles, *supra* note 69, at 156–57.

¹¹⁷ 15 U.S.C. § 1125; Foley, *supra* note 12, at 940, 946–47; Liu, *supra* note 2, at 1428.

¹¹⁸ See Foley, *supra* note 12, at 953–54.

¹¹⁹ See *id.* at 954–55; Liu, *supra* note 2, at 1427–28.

¹²⁰ See Liu, *supra* note 2, at 1428.

¹²¹ *Id.* at 1429–40.

¹²² See Foley, *supra* note 12, at 941; Liu, *supra* note 2, at 1429–33.

¹²³ See Foley, *supra* note 12, at 941; Liu, *supra* note 2, at 1429.

¹²⁴ See Foley, *supra* note 12, at 947; Liu, *supra* note 2, at 1430–32.

¹²⁵ See Liu, *supra* note 2, at 1430–32 (discussing *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), and *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111 (1938)).

‘extensive goodwill.’”¹²⁶ Based on recent trends, it is likely that the courts will hesitate to allow trademark law to dictate how a traditionally copyrightable creation can or cannot be used.¹²⁷

Another area lacking clarity is merchandising claims.¹²⁸ Owners commonly place copyrighted or trademarked images on merchandise unrelated to the image.¹²⁹ For example, one can purchase a Mickey Mouse watch, mug, or t-shirt at a variety of locations.¹³⁰ Again, courts cannot seem to agree on how to treat this merchandise.¹³¹ In *Fleischer Studios v. A.V.E.L.A.*, the Ninth Circuit originally determined that consumers purchased clothing with the character of Betty Boop due to the image, not due to the clothing’s source.¹³² Thus, the merchandise was outside the protection of trademark law.¹³³ The relevant portion of the holding, however, was vacated and superseded by the same Ninth Circuit.¹³⁴ On the other hand, some courts recognize that if the character is still functioning as a trademark, it will be protectable.¹³⁵ Still other courts have taken an even broader approach, stating, “It matters not why the public associates the presence of a character on merchandise with sponsorship or licensing of the merchandise, but only that the public does in fact make this association.”¹³⁶

Dilution claims are another source of tension between copyright and trademark law.¹³⁷ The Federal Trademark Dilution Act of 1995 created a “cause of action to protect famous marks from unauthorized users that attempt to trade upon the goodwill and established renown of such marks and, thereby, dilute their distinctive quality.”¹³⁸ Therefore, an owner of a famous mark could claim that an unauthorized use blurs or tarnishes its goodwill, even if that mark has entered the public domain of copyright.¹³⁹ Blurring occurs when the dis-

¹²⁶ *Foley*, *supra* note 12, at 947 (quoting *DC Comics, Inc. v. Unlimited Monkey Bus., Inc.*, 598 F. Supp. 110, 115–16 (D.C. Ga. 1984)).

¹²⁷ *Liu*, *supra* note 2, at 1433.

¹²⁸ *See Foley*, *supra* note 12, at 948–50; *Liu*, *supra* note 2, at 1433–38.

¹²⁹ *See Foley*, *supra* note 12, at 949; *Liu*, *supra* note 2, at 1434.

¹³⁰ *See Liu*, *supra* note 2, at 1434.

¹³¹ *See Foley*, *supra* note 12, at 948–50; *Liu*, *supra* note 2, at 1436–37.

¹³² *Liu*, *supra* note 2, at 1436–37 (citing *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 636 F.3d 1115, 1124 (9th Cir.), *withdrawn*, 654 F.3d 958 (9th Cir. 2011)).

¹³³ *Id.*

¹³⁴ *Id.* (citing *Fleischer Studios, Inc. v. A.V.E.L.A.*, 654 F.3d 958, 960–61 (9th Cir. 2011)).

¹³⁵ *Foley*, *supra* note 12, at 948 (stating the character must indicate the source when it is placed on the merchandise).

¹³⁶ *Id.* at 949–50.

¹³⁷ *See id.* at 951; *Liu*, *supra* note 2, at 1438.

¹³⁸ *MERGES ET AL.*, *supra* note 7, at 890 (quoting H.R. REP. NO. 104-374 at 3 (1995)). The Federal Trademark Dilution Act of 1995 was followed by the Federal Trademark Dilution Revision Act of 2006, which is currently codified at 15 U.S.C. § 1125(c). *See* Federal Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730 (2006).

¹³⁹ 15 U.S.C. § 1125(c) (2006); *Foley*, *supra* note 12, at 951; *Liu*, *supra* note 2, at 1438. “[A] mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.” 15 U.S.C. § 1125(c)(2)(A).

tinctive nature of the trademark has been diminished.¹⁴⁰ For example, selling furniture under the name “Mickey Mouse’s Home Furnishings” would dilute the name of Mickey Mouse, even though consumers may realize that it is not furniture made by TWDC.¹⁴¹ Additionally, tarnishment—the other form of dilution—harms the reputation of the trademark.¹⁴² Thus, opening a strip club called “Mickey Mouse’s Stripper House” would damage the wholesome, family-friendly image of Mickey that consumers have.¹⁴³ When copyrighted works begin to enter the public domain once again, dilution claims will likely be an important instrument for owners to continue protecting their rights.¹⁴⁴ Some, however, argue that such broad protections could severely limit copyright law’s intention of having a robust public domain.¹⁴⁵

B. Copyright vs. Droit d’auteur

Despite developing disparate copyright laws, the U.S. and French copyright systems started similarly.¹⁴⁶ In comparing the original theories of protection, both systems wanted to promote the dissemination of knowledge as well as reward an author for his or her labor.¹⁴⁷ Additionally, both systems required formalities and extended protection to works that advanced public instruction.¹⁴⁸ Notwithstanding these initial similarities, the two systems diverged and now enshrine very different ideals.¹⁴⁹

As even their names suggest, U.S. copyright and French *droit d’auteur* emphasize the rights of different parties in an ownership and use dispute.¹⁵⁰ *Droit d’auteur* literally translates into “author’s rights,” and—not surprisingly—the French laws use terminology that focuses on the author and his rights.¹⁵¹ On the other hand, the U.S. laws focus on the user of a work and which of the user’s acts are permissible.¹⁵² Even the introductions to each country’s respective copyright act accentuate the differing points of view: France’s law names the author first while the United States’ act begins by defining the term “copyright.”¹⁵³

¹⁴⁰ 15 U.S.C. § 1125(c)(2)(B); Liu, *supra* note 2, at 1438.

¹⁴¹ See 15 U.S.C. § 1125(c)(2)(B); Liu, *supra* note 2, at 1438.

¹⁴² 15 U.S.C. § 1125(c)(2)(C); Liu, *supra* note 2, at 1438.

¹⁴³ See 15 U.S.C. § 1125(c)(2)(C); Liu, *supra* note 2, at 1438.

¹⁴⁴ Foley, *supra* note 12, at 952; Liu, *supra* note 2, at 1438.

¹⁴⁵ Foley, *supra* note 12, at 952; Liu, *supra* note 2, at 1438–39.

¹⁴⁶ VON LEWINSKI, *supra* note 67, at 37–38; Ginsburg, *supra* note 7, at 1023.

¹⁴⁷ See Ginsburg, *supra* note 7, at 1023.

¹⁴⁸ *Id.*

¹⁴⁹ See VON LEWINSKI, *supra* note 67, at 37–38; Ginsburg, *supra* note 7, at 1023.

¹⁵⁰ VON LEWINSKI, *supra* note 67, at 39–40.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* Compare 17 U.S.C. § 102(a) (“Copyright protection subsists . . .”), with CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C.P.I.] [INTELLECTUAL PROPERTY CODE] art. L111-1 (Fr.) (“The author of a work of the mind . . .”) (translated by author).

In analyzing the laws, it becomes clear that France offers protection to a wider variety of works.¹⁵⁴ U.S. copyright law protects “original works of authorship” so long as they are “fixed in a tangible medium.”¹⁵⁵ French law lacks this fixation requirement.¹⁵⁶ Instead, *droit d’auteur* extends protection to “works of the mind whatever may be the kind, form of expression, merit, or destination.”¹⁵⁷ Thus, improvised expression, such as live performances, can be protected without a form of recording to fix the work.¹⁵⁸ Additionally, *droit d’auteur* protects works that U.S. copyright law does not, such as typeface, industrial design, and titles of work.¹⁵⁹

The actual owner of the rights differs in both countries as well.¹⁶⁰ In France, the author—defined as having “personally created the work”—owns all rights to the work.¹⁶¹ Thus, the author must be a natural person and cannot be a legal entity.¹⁶² Because the author is the sole owner of the creation, work made while the author is employed by a company or legal entity still belongs to the author.¹⁶³ U.S. copyright law differs significantly.¹⁶⁴ The author typically is defined as “he to whom anything owes its origin; originator; maker . . . ,”¹⁶⁵ but the actual author may not be the owner of the copyright.¹⁶⁶ If the work was created for hire, the “employer or other person for whom the work was prepared is considered the author.”¹⁶⁷ Thus, a talented animator could lose his or her original creation to his or her employer.¹⁶⁸

A final major difference between copyright and *droit d’auteur* is the duration of the protection.¹⁶⁹ As previously discussed, copyright law is restricted to

¹⁵⁴ See VON LEWINSKI, *supra* note 67, at 45–46; Piotraut, *supra* note 8, at 558, 567–69. Compare 17 U.S.C. § 102, with C.P.I. art. L 112-1.

¹⁵⁵ 17 U.S.C. § 102(a).

¹⁵⁶ See VON LEWINSKI, *supra* note 67, at 44; Piotraut, *supra* note 8, at 572.

¹⁵⁷ C.P.I. art. L112-1 (translated by author); see VON LEWINSKI, *supra* note 67, at 45–46; Piotraut, *supra* note 8, at 558.

¹⁵⁸ See VON LEWINSKI, *supra* note 67, at 44; Piotraut, *supra* note 8, at 572.

¹⁵⁹ Piotraut, *supra* note 8, at 567–68. The U.S., however, does protect some of these categories through other intellectual property means, such as design patents. *Id.* at 558.

¹⁶⁰ See VON LEWINSKI, *supra* note 67, at 47–49; Piotraut, *supra* note 8, at 560–61, 577.

¹⁶¹ Piotraut, *supra* note 8, at 560.

¹⁶² VON LEWINSKI, *supra* note 67, at 47; Piotraut, *supra* note 8, at 561. The exception is that a promoter can own a collective work, even if it is a legal entity. VON LEWINSKI, *supra* note 67, at 47; Piotraut, *supra* note 8, at 561.

¹⁶³ Piotraut, *supra* note 8, at 577.

¹⁶⁴ See VON LEWINSKI, *supra* note 67, at 48–49; Piotraut, *supra* note 8, at 560, 577.

¹⁶⁵ Piotraut, *supra* note 8, at 560 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)).

¹⁶⁶ See VON LEWINSKI, *supra* note 67, at 48; Piotraut, *supra* note 8, at 577.

¹⁶⁷ 17 U.S.C. § 201(b).

¹⁶⁸ See *id.*; Gluck, *supra* note 13; Suddath, *supra* note 2; Ulster, *supra* note 1.

¹⁶⁹ See VON LEWINSKI, *supra* note 67, at 53, 58; Piotraut, *supra* note 8, at 565. Compare 17 U.S.C. §§ 302–304 (2012), with C.P.I. art. L121-1.

“limited Times.”¹⁷⁰ Currently, the duration of a copyright for works created after 1978 is the life of the author plus seventy years.¹⁷¹ For works in their renewal period as of 1978, the term changed to ninety-five years from the date of the original copyright.¹⁷² Thus, the copyright system embodies the notion that an author should not receive protection longer than necessary to incentivize creation in order to benefit the public.¹⁷³ In stark contrast, *droit moral* or *droit d’auteur* is perpetual.¹⁷⁴ The French statute states, “The author has the right to respect of his name, his authorship[,] and his work. The right is attached to his person. It is perpetual, inalienable[,] and imprescriptible. It is transferable upon death to the author’s heirs. Exercise can be given to a third party through wills.”¹⁷⁵ *Droit d’auteur* emphasizes that the work is a part of the author’s person; therefore, it cannot be removed from his or her identity.¹⁷⁶ Even at death, the author can decide who will maintain his or her right in order to protect the part of his or her person that is left on this earth.¹⁷⁷

Despite the plethora of fundamental differences, both copyright and *droit d’auteur* have numerous practical similarities.¹⁷⁸ For example, both France and the United States recognize the work of co-authors; France refers to it as a work of collaboration while the United States calls it a joint work.¹⁷⁹ Neither France nor the United States requires formalities, like registration of the work, in order for the author to receive protection.¹⁸⁰ Once protection has been ex-

¹⁷⁰ U.S. CONST. art. I, § 8, cl. 8.

¹⁷¹ 17 U.S.C. § 302.

¹⁷² *Id.* § 304(b).

¹⁷³ See VON LEWINSKI, *supra* note 67, at 58.

¹⁷⁴ C.P.I. art. L121-1; Piotraut, *supra* note 8, at 565 (referring to the *droit moral* portion of the rights). The exploitation rights, however, are limited in duration to the life of the author plus seventy years, in compliance with Council Directive 93/98/EEC. See C.P.I. art. L123-1 (“*L’auteur jouit, sa vie durant, du droit exclusif d’exploiter son oeuvre sous quelque forme que ce soit et d’en tirer un profit pécuniaire. Au décès de l’auteur, ce droit persiste au bénéfice de ses ayants droit pendant l’année civile en cours et les soixante-dix années qui suivent.*” [The author enjoys, during his lifetime, the exclusive right to exploit his work in any form whatsoever and to derive monetary profit. On the death of the author, this right shall subsist for his successors in title during the current calendar year and the seventy years following.]); Council Directive 93/98/EEC, art. 1, 1993 O.J. (L 290) 9–13 (EC). Both the European and U.S. durations comply with the minimum requirement of the life of the author plus fifty years set by the Berne Convention. See Berne Convention, *supra* note 91, art. 7.

¹⁷⁵ C.P.I. art. L121-1 (“*L’auteur jouit du droit au respect de son nom, de sa qualité et de son oeuvre. Ce droit est attaché à sa personne. Il est perpétuel, inaliénable et imprescriptible. Il est transmissible à cause de mort aux héritiers de l’auteur. L’exercice peut être conféré à un tiers en vertu de dispositions testamentaires.*”).

¹⁷⁶ See C.P.I. art. L121-1; Cotter, *supra* note 8, at 7; Fisher, *supra* note 8, at 168; Oguamanam, *supra* note 7, at 108–09; Piotraut, *supra* note 8, at 551 (quoting DaSilva, *supra* note 8, at 3).

¹⁷⁷ C.P.I. art. L121-1; Piotraut, *supra* note 8, at 565.

¹⁷⁸ See *infra* notes 179–190 and accompanying text.

¹⁷⁹ Piotraut, *supra* note 8, at 561–62.

¹⁸⁰ VON LEWINSKI, *supra* note 67, at 43–44; Piotraut, *supra* note 8, at 573–76. The United States removed formality requirements when it became party to the Berne Convention and passed the Copyright Act of 1976. VON LEWINSKI, *supra* note 67, at 43–44; Piotraut, *supra* note 8, at 573–76.

tended, the author receives almost identical exploitation rights, even though the rights are defined differently.¹⁸¹ Moreover, both countries' courts use a substantial similarity test to determine whether those rights have been violated.¹⁸² If the author's rights have been disturbed, offenders face similar forms of liability or punishment.¹⁸³ Additionally, both countries evoke a fair-use doctrine, which allows a third party to use the work without the author's permission so long as it is used in a prescribed manner.¹⁸⁴

Finally, neither country requires proof of artistic merit in order to extend protection to a work.¹⁸⁵ Instead, courts will look at whether the work was sufficiently original before extending protection.¹⁸⁶ In the United States, the bar is set very low when determining whether a work is original.¹⁸⁷ In *Feist Publications v. Rural Telephone Service*, the U.S. Supreme Court established that only a "modicum of creativity" is required to find that a work is original.¹⁸⁸ French law also vaguely defines originality as "a print of the author's personality."¹⁸⁹ In practice, French courts will usually apply the *Feist* test, resulting in similar decisions of protectable copyright in both countries.¹⁹⁰

III. ANALYSIS

The clock is ticking to find an appropriate treatment of Mickey Mouse so that Mickey's renowned name and symbol can receive continued protection.¹⁹¹ If another extension is not passed, Mickey will enter the public domain at the start of 2024.¹⁹² In order to offset the potential repercussions of entering the

¹⁸¹ VON LEWINSKI, *supra* note 67, at 54–55; Piotraut, *supra* note 8, at 582.

¹⁸² Piotraut, *supra* note 8, at 580. A small difference is that the United States has an additional requirement of actual proof of copying whereas France just examines the similarities between the works. *Id.* at 581.

¹⁸³ *Id.* at 580. Compare 17 U.S.C. § 502 (preliminary injunctions), § 503 (impounding and destroying infringing articles), and § 506 (criminal penalties), with C.P.I. art. L322-1 (preliminary injunctions), art. L335-6 (impounding and destroying infringing articles), and art. L335-2–335-10 (criminal penalties).

¹⁸⁴ Piotraut, *supra* note 8, at 588–89. Compare 17 U.S.C. § 107, with C.P.I. art. L122-5(3).

¹⁸⁵ Piotraut, *supra* note 8, at 559.

¹⁸⁶ See VON LEWINSKI, *supra* note 67, at 45; Piotraut, *supra* note 8, at 571.

¹⁸⁷ See *Feist Publ'n, Inc. v. Rural Tel. Serv., Inc.*, 499 U.S. 340, 362 (1991); MERGES ET AL., *supra* note 7, at 445–48; VON LEWINSKI, *supra* note 67, at 46.

¹⁸⁸ 499 U.S. at 362.

¹⁸⁹ Piotraut, *supra* note 8, at 571 (citing Cour de cassation [Cass.][supreme court for judicial matters] 1e civ., June 30, 1988, R.I.D.A., 1998, 178, 237).

¹⁹⁰ *Id.*

¹⁹¹ See Liu, *supra* note 2, at 1403; Oswald, BBC, *supra* note 2; Suddath, *supra* note 2; Ulster, *supra* note 1.

¹⁹² See Liu, *supra* note 2, at 1403.

public domain, copyright and trademark laws should be reconciled to extend protection to Mickey Mouse and other similarly situated characters.¹⁹³

A. Mickey and U.S. Trademark

As previously mentioned, the name Mickey Mouse and a variety of his images are registered trademarks in the United States and the rest of the world; his character is also subject to copyright protection.¹⁹⁴ Under both areas of law, TWDC receives various protections against others damaging its reputation by unauthorized use of Mickey Mouse.¹⁹⁵ When Mickey enters the public domain, however, it is unclear whether the general use of public domain characters will trump the perpetual protections of trademark laws.¹⁹⁶ Despite the arguments of public domain advocates, the continued protection of the trademark laws should supersede copyright law's public domain because Mickey Mouse has become synonymous with TWDC.¹⁹⁷

For the past eighty-six years, TWDC has supplied the public with Mickey Mouse cartoons.¹⁹⁸ He was featured in a vast majority of Disney's original animated shorts until the mid-1940s.¹⁹⁹ Even after TWDC began to broaden its character and story repertoire, Mickey still remained an important and iconic character—making cameos in Disney films and television shows to this day.²⁰⁰

¹⁹³ See Foley, *supra* note 12, at 960–61; Helfand, *supra* note 67, at 627; Jessica Litman, *Mickey Mouse Emeritus: Character Protection and the Public Domain*, 11 U. MIAMI ENT. & SPORTS L. REV. 429, 432–33, 435 (1994) (pointing out that trademark law could provide a different area of protection once a copyright expires). *But see* Liu, *supra* note 2, at 1428, 1430, 1433.

¹⁹⁴ See Cotter, *supra* note 8, at 7; Liu, *supra* note 2, at 1427–28; *TESS*, *supra* note 13; *TMVIEW*, *supra* note 13.

¹⁹⁵ See 15 U.S.C. §§ 1114, 1125; 17 U.S.C. §§ 102, 106.

¹⁹⁶ See Foley, *supra* note 12, at 954–55; Liu, *supra* note 2, at 1427–28.

¹⁹⁷ *But see* Foley, *supra* note 12, at 960–61; Helfand, *supra* note 67, at 627; Litman, *supra* note 193, at 432–35; Liu, *supra* note 2, at 1428, 1430, 1433.

¹⁹⁸ See Gluck, *supra* note 13; Suddath, *supra* note 2; Ulster, *supra* note 1.

¹⁹⁹ *Mickey Mouse*, ENCYCLOPEDIA OF DISNEY ANIMATED SHORTS, <http://disneyshorts.org/characters/mickey.aspx> [<https://perma.cc/28KW-TP6F>] (last visited Mar. 24, 2016); *List of Disney Animated Shorts*, DISNEY WIKI, http://disney.wikia.com/wiki/List_of_Disney_animated_shorts [<https://perma.cc/YW5Q-94RA>] (last visited Mar. 24, 2016). Mickey and Silly Symphonies were produced simultaneously with more Mickey Mouse cartoons produced. See *Chronological Index*, ENCYCLOPEDIA OF DISNEY ANIMATED SHORTS, http://disneyshorts.org/titles_chron.aspx [<https://perma.cc/5XZJ-JKW8>] (last visited Mar. 24, 2016); *List of Disney Animated Shorts, supra*; *Walt Disney Studios: Shorts*, BIG CARTOON DATABASE (2016), http://www.bcdb.com/cartoons/Walt_Disney_Studios/Shorts/ [<https://perma.cc/FWD6-63EF>]. It was not until the late 1930s that other classic Disney characters, such as Goofy and Donald Duck, began to appear in shorts with Mickey. See *Chronological Index, supra*; *List of Disney Animated Shorts, supra*.

²⁰⁰ See *List of Cameos in Disney Films*, DISNEY WIKI, http://disney.wikia.com/wiki/List_of_cameos_in_Disney_films [<https://perma.cc/R9UY-2R3R>] (last visited Mar. 24, 2016); *The Secret World of Mickey Mouse: Animators Reveal Where Mickey Is Hidden in Disney's Top Films—But Can You Spot Him?*, DAILY MAIL (Jan. 3, 2015, 2:35 PM), <http://www.dailymail.co.uk/news/article-2895481/Animators-reveal-Mickey-hidden-Disney-s-films-spot-him.html> [<https://perma.cc/FTB9-X4A9>].

More recently, he has been featured in his own line of video games, a revamped television show, and even a new animated short that was featured before screenings of the 2013 film *Frozen*.²⁰¹ As a result, consumers identify TWDC as the source of on-screen appearances of Mickey Mouse.²⁰²

In addition to creative works, Mickey is featured on a wide variety of merchandise.²⁰³ TWDC has operated versions of its current business segment, Disney Consumer Products (DCP), since Walt Disney first licensed Mickey Mouse's image in 1929.²⁰⁴ Now, DCP oversees three branches: Disney Licensing, Disney Publishing Worldwide, and Disney Store.²⁰⁵ Therefore, TWDC is able to ensure that all merchandise available to consumers meets its approval and does not damage the consumer goodwill that it has developed over the past eighty-six years.²⁰⁶

Finally, Mickey is the mascot of the Disney theme parks all over the world.²⁰⁷ His presence is found throughout the parks, whether it be in one of the numerous parades, stage shows, or meet-and-greets.²⁰⁸ Mickey is also the first costumed character to receive aesthetic, practical, and technical updates in the parks.²⁰⁹ For example, TWDC unveiled an interactive meet-and-greet where guests can actually converse with Magician Mickey.²¹⁰ He sings "Happy

²⁰¹ See *Get a Horse*, WALT DISNEY ANIMATION STUDIOS, <http://www.disneyanimation.com/projects/getahorse> [<https://perma.cc/Y5M4-UPQ5>] (last visited Mar. 24, 2016); *Oswald*, BBC, *supra* note 2; *Oswald the Rabbit Returns: Walt Disney's Lost Bunny Hops into 21st Century*, LA TIMES: HERO COMPLEX (Dec. 5, 2010, 9:13 AM), <http://herocomplex.latimes.com/games/oswald-the-rabbit-returns-walt-disneys-lost-bunny-hops-into-21st-century/> [<https://perma.cc/LMK3-7LDL>].

²⁰² See *Marketing Evolution*, *supra* note 64; *Mickey, The Universal Icon*, *supra* note 64.

²⁰³ See Liu, *supra* note 2, at 1434; *Mickey Mouse*, DISNEY STORE, <http://www.disneystore.com/mickey-friends/mickey-mouse/mn/1000131/> [<https://perma.cc/C69K-6G25>] (last visited Mar. 24, 2016) (featuring Mickey Mouse merchandise sold online).

²⁰⁴ *About Us*, DISNEY CONSUMER PRODUCTS, <https://www.disneyconsumerproducts.com/> [<https://perma.cc/NJ9Z-2DDK>] (follow "About Us" hyperlink) (last visited Mar. 24, 2016); see also *Walt Disney Co. v. Best*, No. 88-civ-1595, 1990 U.S. Dist. LEXIS 12604, *1–2 (S.D.N.Y. 1990); JANET WASKO, UNDERSTANDING DISNEY: THE MANUFACTURE OF FANTASY 49 (2001).

²⁰⁵ See *About Us*, *supra* note 204.

²⁰⁶ See *id.*

²⁰⁷ See *Parks & Destinations*, DISNEY PARKS, <http://disneyparks.disney.go.com/resorts-parks-destinations/> [<https://perma.cc/EG7R-NKN7>] (last visited Mar. 24, 2016) (listing the various Disney Parks and Destinations around the world that feature Mickey in a variety of entertainment experiences); Ulster, *supra* note 1.

²⁰⁸ See *Explore Walt Disney World*, WALT DISNEY WORLD, <https://disneyworld.disney.go.com/activities/> [<https://perma.cc/7EGN-9WZS>] (last visited Mar. 24, 2016) (listing examples of where to find Mickey throughout the Walt Disney World Resort in Orlando, Florida).

²⁰⁹ See Jennifer Fickley-Baker, *Meeting Magician Mickey Mouse at Town Square Theater in Magic Kingdom Park*, DISNEY PARKS BLOG (Oct. 21, 2013), <http://disneyparks.disney.go.com/blog/2013/10/meeting-magician-mickey-mouse-at-town-square-theater-in-magic-kingdom-park/> [<https://perma.cc/T4JY-VHEU>]; Jim Korkis, *A Brief History of Disney Character Costumes*, MOUSEPLANET (Sept. 11, 2013), http://www.mouseplanet.com/10463/A_Brief_History_of_Disney_Character_Costumes [<https://perma.cc/6SUR-R83U>].

²¹⁰ See Fickley-Baker, *supra* note 209.

Birthday,” tells jokes, and even performs magic tricks at the guests’ requests.²¹¹ TWDC’s tendency to invest in Mickey demonstrates the importance that the company places on Mickey’s representation of the Disney brand.²¹²

As mentioned in Part II.A, the primary purpose of trademark law is to prevent consumer confusion.²¹³ It has been well established that, in trademark law, confusion refers to consumer confusion as to the *source* of whatever goods or products brandish the trademark.²¹⁴ In this particular situation, the prevailing presence of Mickey Mouse throughout all of TWDC’s business segments demonstrates that consumers are likely to perceive TWDC as the source of Mickey.²¹⁵ Thus, if an author were to create a new work featuring Mickey Mouse, whether it be a new animation or a t-shirt, a consumer would likely believe that TWDC created or authorized the work.²¹⁶

The consequences of consumer confusion could be very troublesome for TWDC.²¹⁷ The company prides itself on creating and maintaining an international, family-friendly reputation.²¹⁸ But, once Mickey enters the public domain, an author could create a racially insensitive or even a pornographic Mickey Mouse cartoon.²¹⁹ Currently, the U.S. Supreme Court leans toward honoring public domain users’ rights over the trademark owners’ rights when it comes to determining which intellectual property law should be the primary protection of the work.²²⁰ Therefore, this unauthorized cartoon probably would be legal, but the likelihood of consumers still associating it with Disney—even

²¹¹ See *id.*

²¹² See WASKO, *supra* note 204, at 125; Fickley-Baker, *supra* note 209; Korkis, *supra* note 209.

²¹³ See 15 U.S.C. § 1125; MERGES ET AL., *supra* note 7, at 765; Nickles, *supra* note 69, at 156.

²¹⁴ See 15 U.S.C. § 1114(1); Fisher Stoves, Inc. v. All Nighter Stove Works, Inc., 626 F.2d 193, 194–95 (1st Cir. 1980) (citing Keebler Co. v. Rovira Biscuit Corp., 624 F.2d 366, 372, 378 (1st Cir. 1980); TGI Friday’s, Inc. v. Int’l Rest. Grp., Inc., 569 F.2d 895, 899 (5th Cir. 1978); Baker v. Simmons Co., 307 F.2d 458, 461 (1st Cir. 1962)).

²¹⁵ See *Walt Disney Co.*, 1990 U.S. Dist. LEXIS 12604, at *1–2; Helfand, *supra* note 67, at 671; *Marketing Evolution*, *supra* note 64; *Mickey, The Universal Icon*, *supra* note 64. See *About The Walt Disney Company*, WALT DISNEY CO., <http://thewaltdisneycompany.com/about-disney/company-overview> [<https://perma.cc/F8GY-G4XN>] (last visited Mar. 24, 2016) (listing examples of Mickey Mouse used in corporate symbols).

²¹⁶ See Nickles, *supra* note 69, at 157; *Marketing Evolution*, *supra* note 64; *Mickey, The Universal Icon*, *supra* note 64.

²¹⁷ See *McGregor-Doniger, Inc. v. Drizzle, Inc.*, 599 F.2d 1126, 1134–35 (2d Cir. 1979); *Walt Disney Co.*, 1990 U.S. Dist. LEXIS 12604, at *2, *7; Foley, *supra* note 12, at 924–25; Helfand, *supra* note 67, at 627–28; Liu, *supra* note 2, at 1396–97; *Marketing Evolution*, *supra* note 64; *Mickey, The Universal Icon*, *supra* note 64.

²¹⁸ See *About The Walt Disney Company*, *supra* note 215.

²¹⁹ See Foley, *supra* note 12, at 924–25; Helfand, *supra* note 67, at 627–28; Liu, *supra* note 2, at 1396–97.

²²⁰ See Liu, *supra* note 2, at 1432–33 (discussing *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) and *Kellogg Co. v. Nat’l Biscuit Co.*, 305 U.S. 111 (1938)).

though they may not believe that Disney authorized its publication—is high.²²¹ As a result, consumer goodwill for TWDC and all of its business segments would be damaged.²²²

Some may argue that this is the most appropriate response in order to keep TWDC in check and prevent it from becoming too powerful.²²³ Critics of TWDC point to its purported promotion of negative ideals, such as false representations of love or race.²²⁴ Others claim that TWDC is too big and too far-reaching.²²⁵ Still others declare TWDC uses its dominance for questionable business practices, such as “pric[ing] middle-class families out.”²²⁶ The more farfetched conspiracies claim that TWDC promotes Satanism and the occult.²²⁷

Although it is true that TWDC is a very influential company,²²⁸ these critics appear to neglect many of the company’s positive contributions.²²⁹ For example, the presence of a TWDC theme park significantly improves the local economy of wherever it is located.²³⁰ An independent study in 2013 reported that the Disneyland Resort contributed \$5.7 billion annually to southern Cali-

²²¹ See Foley, *supra* note 12, at 924–25; Helfand, *supra* note 67, at 627–28; Liu, *supra* note 2, at 1396–97; *Marketing Evolution*, *supra* note 64; *Mickey, The Universal Icon*, *supra* note 64.

²²² See *McGregor-Doniger*, 599 F.2d at 1134–35; *Walt Disney Co.*, 1990 U.S. Dist. LEXIS 12604, at *2, *7; Helfand, *supra* note 67, at 627–28.

²²³ See ANTI-DISNEY COALITION, <http://www.angelfire.com/pq/psychonymph/adc.html> [<https://perma.cc/3GUN-E2K5>] (last visited Mar. 24, 2016); DISNEY-SUCKS.COM, <http://disney-sucks.com> [<https://perma.cc/7NVU-TNSZ>] (last visited Mar. 24, 2016).

²²⁴ See L.C. David, *Recent Disney Controversies, Criticisms, and Scandals*, HUBPAGES (Feb. 22, 2014), <http://lcdwriter.hubpages.com/hub/Recent-Disney-Scandals> [<https://perma.cc/5DAW-W9JV>]; M.J. Stephey, *Top 10 Disney Controversies*, TIME (Dec. 9, 2009), <http://entertainment.time.com/2009/12/09/top-10-disney-controversies/> [<https://perma.cc/CL4U-ZQ4K>].

²²⁵ See Riin Gill, *Disney: When Mice Get Too Big*, RIIN’S RANTS (Feb. 29, 2004), <http://www-personal.umich.edu/~riin/culture/disney.htm> [<https://perma.cc/J8PH-WC3W>].

²²⁶ Drew Harwell, *How Theme Parks Like Disney World Left the Middle Class Behind*, WASH. POST (June 12, 2015), <https://www.washingtonpost.com/news/business/wp/2015/06/12/how-theme-parks-like-disney-world-left-the-middle-class-behind/> [<https://perma.cc/XJT3-99GN>].

²²⁷ See Louis Ackerman, *10 Reasons Disney Are Unspeakably Evil*, BEST FOR FILM (Feb. 2, 2011), <http://bestforfilm.com/film-blog/10-reasons-disney-are-unspeakably-evil/> [<https://perma.cc/LGP6-N4Z9>]; David Gardner, *Disney Corporation: Making Evil Look Good?*, WAKING TIMES (Sept. 29, 2014), <http://www.wakingtimes.com/2014/09/29/disney-corporation-making-evil-look-good/> [<https://perma.cc/UV8P-9RQE>].

²²⁸ See MERGES ET AL., *supra* note 7, at 527; Langvardt & Langvardt, *supra* note 80, at 237–38; Liu, *supra* note 2, at 1425–26.

²²⁹ See Ackerman, *supra* note 227; Gardner, *supra* note 227; Gill, *supra* note 226; Stephey, *supra* note 224. *But see* David, *supra* note 224 (pointing out socially positive controversy, such as benefits to same-sex partners and the nonchalant introduction of same-sex parents on a popular Disney Channel show).

²³⁰ See Christi Erwin Donnan, *New Disney Park Experiences Result in Economic Benefit for Communities Around the World*, DISNEY POST (Aug. 30, 2012), <https://prod.thewaltdisneycompany.com/blog/new-disney-park-experiences-result-economic-benefit-communities-around-world> [<https://perma.cc/3CTA-LPM7>].

fornia's economy, in addition to 28,000 regional jobs.²³¹ This 2013 study reports a 21% increase from a previous 2009 study, which showed an economic impact of \$4.7 billion and 21,000 jobs.²³² The impacts are even more significant in Florida, with Walt Disney World generating approximately \$18.2 billion annually as of 2009.²³³ The economic benefits also stretch beyond the United States.²³⁴ The most visited theme park in Europe, Disneyland Paris, contributed a total of €50 billion to the French economy as of 2012 and "6.2% of foreign exchange income generated by tourism in France has been provided by travellers whose primary reason for coming to the country was to visit" Disneyland Paris.²³⁵ In fiscal year 2014, Hong Kong Disneyland employed approximately 5100 full-time and 2700 part-time employees and contributed about HK\$13.2 billion in economic impact.²³⁶

In addition, TWDC does its best to contribute more than just money to society.²³⁷ TWDC has numerous initiatives to promote corporate citizenship across all of its business segments, which range from encouraging physical activity and healthy habits through its media outlets to helping children and families in need.²³⁸ In May 2013, TWDC's program VoluntEARS celebrated thirty years of service, recording over 7.5 million volunteer hours in over forty countries.²³⁹

²³¹ Hugo Martin, *Disneyland Resort Generates \$5.7 Billion in Economic Activity a Year*, *Study Says*, L.A. TIMES (June 11, 2015), <http://www.latimes.com/business/la-fi-disneyland-resort-economy-20150611-story.html> [<https://perma.cc/CZAZ-LVB9>].

²³² *Id.*; see Joseph Pimentel, *Study: Disneyland Resort Generates \$5.7 Billion of Southern California Economy*, ORANGE CTY. REG. (June 11, 2015), <http://www.ocregister.com/articles/study-665882-resort-disneyland.html> [<https://perma.cc/QL6W-U7TQ>].

²³³ Jason Garcia, *Disney Says It Generates \$18.2 Billion Annual Ripple Effect in Florida*, ORLANDO SENTINEL (Apr. 13, 2011), http://articles.orlandosentinel.com/2011-04-13/the-daily-disney/os-disney-economic-impact-20110413_1_disney-cruise-line-world-president-meg-crofton-disney-vacation-club [<https://perma.cc/SKE2-56D2>].

²³⁴ See Donnan, *supra* note 230; Christian Sylt, *The Secrets Behind Disney's \$2.2 Billion Theme Park Profits*, FORBES (July 14, 2014), <http://www.forbes.com/sites/csylt/2014/07/14/the-secrets-behind-disneys-2-2-billion-theme-park-profits/3/> [<https://perma.cc/5ATP-HUHX>].

²³⁵ Sylt, *supra* note 234.

²³⁶ Sidney Sin & Lana Wong, *Hong Kong Disneyland Announces Fifth Consecutive Record-Breaking Year*, HONG KONG DISNEYLAND (Feb. 9, 2015), <http://news-en.hongkongdisneyland.com/PressReleases/PressReleaseDetail.aspx?AssetId=8e089de2-4e13-4a12-80d6-1d982f230448> [<https://perma.cc/KK2K-CJUQ>].

²³⁷ *See Our Goal*, DISNEY CITIZENSHIP, <https://thewaltdisneycompany.com/about/#corporate-citizenship> [<https://perma.cc/2GPP-RKCF>] (last visited Apr. 9, 2016).

²³⁸ *See, e.g.*, THE WALT DISNEY CO., 2013 DISNEY CITIZENSHIP PERFORMANCE SUMMARY 30–46, <https://ditm-twdc-us.storage.googleapis.com/FY13PerfSummary.pdf> [<https://perma.cc/7F6N-WFS2>]; THE WALT DISNEY CO., 2012 DISNEY CITIZENSHIP PERFORMANCE SUMMARY 14–28, https://ditm-twdc-us.storage.googleapis.com/FY12DisneyCitizenshipSummary_FINAL_0.pdf [<https://perma.cc/6V7X-CF98>].

²³⁹ *See Disney Citizenship Invites Fans to Celebrate 30th Anniversary of Disney VoluntEARS at D23 Expo 2013*, BUSINESS WIRE (July 19, 2013), http://www.businesswire.com/news/home/20130719005118/en/Disney-Citizenship-Invites-Fans-Celebrate-30th-Anniversary#.VOAFj_nF-_t [https://perma.cc/VOAFj_nF-_t].

Moreover, Disney's films do promote positive lessons, despite the criticism the company receives regarding some of its more dated themes.²⁴⁰ The 2013 animated film *Frozen* demonstrated that Disney is breaking the stereotypical fairytale plot by bringing its films more in line with modern ideals through its inclusion of strong female protagonists and more realistic depictions of love and sacrifice.²⁴¹

But if Disney is such a successful and diversified company, why should anyone care if it loses the right to protect Mickey Mouse? The same mouse that built Disney could also spell its decline.²⁴² Public domain use of Mickey could begin to chisel away at Disney's family-friendly reputation and give critics and conspiracy theorists more ammunition to besmirch TWDC and its activities.²⁴³ The possible ripple effect is logical: more impressionable consumers are likely to place less value on the Disney brand, which will slowly begin to impact negatively the economic contributions the company makes.²⁴⁴ Additionally, competitors could attempt to use Mickey to further imitate the success of TWDC.²⁴⁵ Imagine being able to meet Mickey Mouse at SeaWorld,²⁴⁶ or Universal's Islands of Adventure transforming its Marvel-themed area to use

perma.cc/EVR2-MWX5]; Christi Erwin Donnan, *Celebrating the 30th Anniversary of Disney VolunteERS at Disney Parks Around the World*, DISNEY POST (May 9, 2013), <https://prod.thewaltdisneycompany.com/blog/celebrating-30th-anniversary-disney-volunteers-disney-parks-around-world> [<https://perma.cc/EP2-XXET>]; David Gill, *Disney VolunteERS Celebrate 30 Years Strengthening Communities*, DISNEY POST (May 1, 2013), <https://prod.thewaltdisneycompany.com/blog/disney-volunteers-celebrate-30-years-strengthening-communities> [<https://perma.cc/2F9E-JQ8D>].

²⁴⁰ See Autumn Harbison, *25 Disney Characters Who Taught Us Life Lessons*, MIC (Aug. 3, 2013), <http://mic.com/articles/56993/25-disney-characters-who-taught-us-life-lessons> [<https://perma.cc/ZQ2Q-4ULB>]; Lauren Hartmann, *15 Lessons for My Daughter from Disney*, DISNEY BABY, <http://www.disneybaby.com/blog/15-life-lessons-for-my-daughter-from-disney-movies/> [<https://perma.cc/V8LV-ZBXT>] (last visited Mar. 24, 2016); Kelly K., *What Your Kids Can Learn from Disney Films*, FAMILIES.COM, <http://www.families.com/blog/whatyourkidscanlearnfromdisneyfil> [<https://perma.cc/V88P-BY5R>] (last visited Mar. 24, 2016).

²⁴¹ See Dylan Cannon, *5 Moral Lessons from Disney's 'Frozen'*, KSL.COM (Mar. 17, 2014, 4:23 PM), <http://www.ksl.com/?nid=1205&sid=29097698> [<https://perma.cc/2MB3-VNHM>]; Emily Lighezzolo, *Disney No Longer 'Frozen' in Antiquated Gender Stereotypes*, ARTIFICE (Feb. 3, 2014), <http://the-artifice.com/disney-gender-stereotypes/> [<https://perma.cc/3Q9P-P94V>].

²⁴² See *McGregor-Doniger*, 599 F.2d at 1134–35; Ulster, *supra* note 1.

²⁴³ See *McGregor-Doniger*, 599 F.2d at 1134–35; *Walt Disney Co.*, 1990 U.S. Dist. LEXIS 12604, at *2, *7; Foley, *supra* note 12, at 924–25; Helfand, *supra* note 67, at 627–28; Liu, *supra* note 2, at 1396–97; *Marketing Evolution*, *supra* note 64; *Mickey, The Universal Icon*, *supra* note 64.

²⁴⁴ See *McGregor-Doniger*, 599 F.2d at 1134–35; *Walt Disney Co.*, 1990 U.S. Dist. LEXIS 12604, at *2, *7; Foley, *supra* note 12, at 924–25; Helfand, *supra* note 67, at 627–28; Liu, *supra* note 2, at 1396–97; *Marketing Evolution*, *supra* note 64; *Mickey, The Universal Icon*, *supra* note 64.

²⁴⁵ See Foley, *supra* note 12, at 924–25; Helfand, *supra* note 67, at 627–28; Liu, *supra* note 2, at 1396–97.

²⁴⁶ Clothing—including costumes—typically is not copyrightable under the Useful Article Doctrine. See 17 U.S.C. § 101 (2012). Useful articles, however, can be protected “to the extent that such design incorporates features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects” of the clothing. *Id.*

Disney's expired copyrighted material.²⁴⁷ Increased competition typically benefits consumers;²⁴⁸ however, a balance should be struck when the competition unfairly damages the image and reputation of one of the competing companies.²⁴⁹

The conflicts between copyright and trademark law place TWDC in a unique position.²⁵⁰ Allowing the traditional uses of public domain material could negatively affect TWDC's business operations and reputation.²⁵¹ Accordingly, trademark law should be used to determine the outcome when the two areas of law overlap.²⁵² This would not prevent authors from creating new works with Mickey Mouse so long as it was made clear that TWDC was not the work's source.²⁵³ Additionally, the traditional trademark defenses, such as parody and fair use, would still be applicable.²⁵⁴ Thus, public domain users would have reasonable access to the character of Mickey Mouse despite the trademark protections.²⁵⁵

The strongest limitations to the public domain usage of Mickey Mouse are most likely to come from the Federal Trademark Dilution Revision Act of 2006.²⁵⁶ As previously discussed, the Dilution Act prevents others from diluting a trademark through blurring or tarnishment.²⁵⁷ In order to receive protec-

²⁴⁷ Currently, Universal's Islands of Adventure features the now Disney-owned superheroes in its Marvel Super Hero Island. Ken Storey, *Making Sense of Disney and Universal's Messy Joint Custody of Marvel*, ORLANDO WEEKLY (May 22, 2015, 10:01 AM), <http://www.orlandoweekly.com/Blogs/archives/2015/05/22/making-sense-of-disney-and-universals-messy-joint-custody-of-marvel> [https://perma.cc/Y6FH-XKVP]. Pursuant to a contract made in 1994, Universal has exclusive rights to the use of these characters "East of the Mississippi," so long as the area is "operated and maintained in a first class manner consistent with the highest standards of the theme park industry. See MCA Inc. & Marvel Ent. Grp., *Marvel Agreement* at 7 (Ex. 10.57) (Mar. 22, 1994), <http://www.sec.gov/Archives/edgar/data/1262449/000119312510008732/dex1057.htm> [https://perma.cc/YKQ5-GDJM]; see also Storey, *supra*.

²⁴⁸ See *Eon Labs Mfg. v. Watson Pharm., Inc.* 164 F. Supp. 2d 350, 359 (S.D.N.Y. 2001) ("The fundamental policy underlying the law, of course, is that competition benefits consumer welfare."); *Cel-Tech Comm'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 567-68 (Cal. 1999).

²⁴⁹ See Daniel B. Ravicher & Shani C. Dilloff, *Antitrust Scrutiny of Intellectual Property Exploitation: It Just Don't Make No Kind of Sense*, 8 SW. J.L. & TRADE AM. 83, 141-43 (2001). Traditionally, it has been difficult balancing the rights protected by intellectual property law with the pro-competitive antitrust laws. See *id.*

²⁵⁰ See Foley, *supra* note 12, at 954-55; Liu, *supra* note 2, at 1427-28.

²⁵¹ See *McGregor-Doniger*, 599 F.2d at 1134-35; *Walt Disney Co.*, 1990 U.S. Dist. LEXIS 12604, at *2, *7; Foley, *supra* note 12, at 924-25; Helfand, *supra* note 67, at 627-28; Liu, *supra* note 2, at 1396-97; Nickles, *supra* note 69, at 156-57; *Marketing Evolution*, *supra* note 64; *Mickey, The Universal Icon*, *supra* note 64.

²⁵² See *MERGES ET AL.*, *supra* note 7, at 766-68; Foley, *supra* note 12, at 939, 941, 955-56; Nickles, *supra* note 69, at 156-57.

²⁵³ See 15 U.S.C. §§ 1058, 1127; *MERGES ET AL.*, *supra* note 7, at 765; Liu, *supra* note 2, at 1427-28; Nickles, *supra* note 69, at 156.

²⁵⁴ 15 U.S.C. § 1115(b) (listing all potential defenses to trademark infringement).

²⁵⁵ See *id.*; Liu, *supra* note 2, at 1439.

²⁵⁶ See 15 U.S.C. § 1125(c).

²⁵⁷ *Id.*; see also *supra* notes 138-45.

tion, a trademark must be famous, the violator must be making a commercial use of the mark, the violating use must have begun after the mark became famous, and the violator's use must dilute the mark's ability to distinguish goods or services.²⁵⁸ The key concern to bringing a dilution claim is the fame of the trademark.²⁵⁹ In the case of Mickey Mouse, he would meet the requisite level of recognition under the statute's provisions.²⁶⁰ He is an internationally recognized character and has had this reputation for decades.²⁶¹ Therefore, in many situations, TWDC would be able to prevent Mickey Mouse from being used in a way that "impairs [his] distinctiveness" or that "harms [his] reputation" through the protections of the Dilution Act.²⁶² Thus, TWDC would be able to stop others from flooding the market with unrelated Mickey Mouse-branded companies in addition to inhibiting uses that would damage Mickey's family-friendly reputé.²⁶³

B. The French Droit Moral to the Rescue

Allowing trademark law to supersede the public domain is likely to receive much criticism.²⁶⁴ The ideas that flow from France's *droit d'auteur* could provide comfort to those skeptics.²⁶⁵ As discussed in Part II, *droit d'auteur*

²⁵⁸ See 15 U.S.C. § 1125(c); *Syndicate Sales, Inc. v. Hampshire Paper Corp.*, 192 F.3d 633, 639 (7th Cir. 1999); *Panavision Int'l L.P. v. Toeppen*, 141 F.3d 1316, 1324 (9th Cir. 1998); *M2 Software, Inc. v. Viacom, Inc.*, 119 F. Supp. 2d 1061, 1071 (C.D. Cal. 2000).

²⁵⁹ See 15 U.S.C. § 1125(c); *Syndicate Sales*, 192 F.3d at 639; *Panavision Int'l*, 141 F.3d at 1324; *M2 Software*, 119 F. Supp. 2d at 1071–72.

²⁶⁰ See 15 U.S.C. § 1125(c). The statute gives the following nonexhaustive list for how a plaintiff can prove a mark is famous:

- (i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties. (ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark. (iii) The extent of actual recognition of the mark. (iv) Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

§ 1125(c)(2)(A).

²⁶¹ See *Marketing Evolution*, *supra* note 64; *Mickey, The Universal Icon*, *supra* note 64.

²⁶² 15 U.S.C. § 1125(c)(2)(B)–(C) (defining "dilution by blurring" and "dilution by tarnishment," respectively).

²⁶³ See *id.* The Dilution Act is also subject to fair-use exceptions. 15 U.S.C. § 1125(c)(3) ("The following shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection: (A) Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person's own goods or services, including use in connection with—(i) advertising or promotion that permits consumers to compare goods or services; or (ii) identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner. (B) All forms of news reporting and news commentary. (C) Any noncommercial use of a mark.").

²⁶⁴ See *Foley*, *supra* note 12, at 960–61; *Helfand*, *supra* note 67, at 627; *Litman*, *supra* note 193, at 432–35; *Liu*, *supra* note 2, at 1428, 1430, 1433.

²⁶⁵ Compare *Cotter*, *supra* note 8, at 13 (quoting *Netanel*, *supra* note 51, at 387), with 15 U.S.C. § 1125(c).

gives expansive rights to the author of a work, including some perpetual rights to the author's creation.²⁶⁶ The personality theory supports the author's rights based on the belief that the creation represents part of the author's personality.²⁶⁷ The close association between Mickey Mouse and TWDC is also reminiscent of the personality theory.²⁶⁸ Mickey is so entangled with the identity of the TWDC that it is hard to rationalize a separation of the two.²⁶⁹ Consequently, *droit d'auteur* provides a justification for a trademark-favored interpretation of TWDC's rights in Mickey Mouse.²⁷⁰

Perhaps the most cohesive concepts from France and the United States are *droit moral* and the rights found in the Federal Trademark Dilution Revision Act of 2006.²⁷¹ As discussed in Part I, *droit moral* consists of four key rights, but the two expressly imprescriptible ones are the right of attribution and the right of integrity.²⁷² The right of attribution requires that the author be given credit for his work, even after exploitation rights have expired.²⁷³ This right is comparable to the importance of the source in trademark law.²⁷⁴ Furthermore, the right of integrity bars striking resemblance to the Dilution Act.²⁷⁵ When the right of integrity is translated literally from French, it means "the right to respect for his . . . work."²⁷⁶ Typically, the right of integrity prevents modifications of the work and ensures protection for the author's overall reputation.²⁷⁷ Similarly, the Dilution Act precludes a trademark violator from tarnishing the reputation of the author.²⁷⁸ Thus, the parallels between *droit moral* and the Di-

²⁶⁶ See C.P.I. art. L121-1; VON LEWINSKI, *supra* note 67, at 45–46; Piotraut, *supra* note 8, at 558, 565, 567–69.

²⁶⁷ See Cotter, *supra* note 8, at 7; Fisher, *supra* note 8, at 168; Oguamanam, *supra* note 7, at 108–09; Piotraut, *supra* note 8, at 551 (quoting DaSilva, *supra* note 8, at 3).

²⁶⁸ See Cotter, *supra* note 8, at 7; Fisher, *supra* note 8, at 168; Oguamanam, *supra* note 7, at 108–09; Piotraut, *supra* note 8, at 551 (quoting DaSilva, *supra* note 8, at 3); *Marketing Evolution*, *supra* note 64; *Mickey, The Universal Icon*, *supra* note 64.

²⁶⁹ See Cotter, *supra* note 8, at 7; Fisher, *supra* note 8, at 168; Oguamanam, *supra* note 7, at 108–09; Piotraut, *supra* note 8, at 551 (quoting DaSilva, *supra* note 8, at 3); *Marketing Evolution*, *supra* note 64; *Mickey, The Universal Icon*, *supra* note 64.

²⁷⁰ See VON LEWINSKI, *supra* note 67, at 45–46; Foley, *supra* note 12, at 960–61; Helfand, *supra* note 67, at 627; Liu, *supra* note 2, at 1428, 1430, 1433; Piotraut, *supra* note 8, at 564.

²⁷¹ See 15 U.S.C. § 1125(c); C.P.I. art. L111-1 ("This [author's] right shall include intellectual and moral attributes . . .") (translated by author); Berne Convention, *supra* note 91, art. 6bis.

²⁷² ADENEY, *supra* note 47, at 169; Cotter, *supra* note 8, at 10–11; Zemer, *supra* note 47, at 1524.

²⁷³ ADENEY, *supra* note 47, at 179–80; Cotter, *supra* note 8, at 10–12.

²⁷⁴ See 15 U.S.C. §§ 1058, 1114(1), 1127; *Fisher Stoves*, 626 F.2d at 195; ADENEY, *supra* note 47, at 179–80; Cotter, *supra* note 8, at 10–12; Liu, *supra* note 2, at 1427; Nickles, *supra* note 69, at 156.

²⁷⁵ Compare ADENEY, *supra* note 47, at 181–83, and Cotter, *supra* note 8, at 13 (quoting Netanel, *supra* note 51, at 387), with 15 U.S.C. § 1125(c).

²⁷⁶ ADENEY, *supra* note 47, at 181 ("droit au respect de son . . . œuvre"); Cotter, *supra* note 8, at 10–11.

²⁷⁷ See ADENEY, *supra* note 47, at 181–83; Cotter, *supra* note 8, at 13 (quoting Netanel, *supra* note 51, at 387).

²⁷⁸ 15 U.S.C. § 1125(c)(2)(C).

lution Act can provide a justification for a unique treatment of some copyrighted works.²⁷⁹

When applying *droit d'auteur* to Mickey's situation, however, a key problem arises: Mickey is owned by a corporation, not an individual.²⁸⁰ Unlike copyright law, *droit d'auteur* does not permit a corporation to be defined as an author because a corporation cannot create.²⁸¹ In order to reconcile this difference, however, two different arguments can be made.²⁸² First, one can argue that Walt Disney was the author of Mickey Mouse.²⁸³ Under *droit d'auteur*, an author can assign his or her rights to heirs or a third party upon death.²⁸⁴ Even though a corporation cannot create, it can still own the rights that have been assigned by the author;²⁸⁵ therefore, TWDC would have been able to receive the rights to protect Mickey at Walt Disney's death.²⁸⁶ The second, and perhaps more straightforward, rationale is dependent on Mickey Mouse being a collective work.²⁸⁷ Under *droit d'auteur*, a collective work is defined as:

[A] work created on the initiative of either a natural or legal person who edits, publishes[,] and divulges it under his/its own direction and own name. With this kind of work, the personal contributions of the participating authors merge to the point that it is not possible to attribute to each of them a distinct right in the composite work as a whole.²⁸⁸

²⁷⁹ Compare Cotter, *supra* note 8, at 13 (quoting Netanel, *supra* note 51, at 387), with 15 U.S.C. § 1125(c).

²⁸⁰ See VON LEWINSKI, *supra* note 67, at 47; Piotraut, *supra* note 8, at 561; *Marketing Evolution*, *supra* note 64; *Mickey, The Universal Icon*, *supra* note 64; *TESS*, *supra* note 13.

²⁸¹ See 17 U.S.C. § 201(b); ADENEY, *supra* note 47, at 177; VON LEWINSKI, *supra* note 67, at 47; Piotraut, *supra* note 8, at 561; Marie-Andree Weiss, *French Civil Supreme Court: A Corporation Cannot Be the Author of a Work Protected by Copyright*, 1709 BLOG (Feb. 3, 2015), <http://the1709blog.blogspot.com/2015/02/french-civil-supreme-court-corporation.html> [https://perma.cc/DX59-BC4R] (citing Cour de cassation [Cass.][supreme court for judicial matters], 1e civ., Jan. 15, 2015, Bull. Civ. I, No. 13-23566 (Fr.)).

²⁸² See C.P.I. art. L121-1; ADENEY, *supra* note 47, at 177–78; Weiss, *supra* note 281.

²⁸³ See Gluck, *supra* note 13; Suddath, *supra* note 2; Ulster, *supra* note 1. The lead animator of Steamboat Willie, Ub Iwerks, would also have a claim for authorship; however, he assigned his rights to Walt Disney when he left the company in the 1930s. RICHARD HOLLIS & BRIAN SIBLEY, *THE DISNEY STUDIO STORY* 19 (1998). For the sake of the argument, we can assume that the assignment of his moral rights vested in TWDC upon his death in 1971. See C.P.I. art. L121-1; Kenneth Chisholm, *Ub Iwerks—Biography*, INT'L MOVIE DATABASE, <http://www.imdb.com/name/nm0412650/bio> [https://perma.cc/7CBT-X8DT].

²⁸⁴ See C.P.I. art. L121-1; Weiss, *supra* note 281; *supra* note 175 (providing the language of the French statute).

²⁸⁵ See Weiss, *supra* note 281 (“[U]nder French law, a corporation may still acquire the copyright of a work, collective or not, by purchasing it or licensing it[;] a corporation may, of course, sign a check, but is not able to create.”).

²⁸⁶ See C.P.I. art. L121-1; Weiss, *supra* note 281.

²⁸⁷ See ADENEY, *supra* note 47, at 177–78.

²⁸⁸ *Id.* at 177; see also C.P.I. art. L113-2.

Thus, if a company, such as TWDC, were to initiate and distribute the creation under its name, the company would receive the same rights as a natural-person author, including the rights prescribed under *droit moral*.²⁸⁹ Though TWDC was still Walt Disney Studio at the time, it initiated the creation of Mickey Mouse and his animated adventures and ultimately “peddled [the ‘Steamboat Willie’ cartoon itself] on the open market” instead of using a distributor.²⁹⁰ Therefore, the initial issue of a company being the author of the work would be resolved.²⁹¹

These justifications are not radically different from the ultimate treatment of corporations’ ownership rights in the United States.²⁹² Copyright allows a corporation to be the author of a work created by an employee “within the scope of his or her employment.”²⁹³ In essence, a corporation can have very similar rights under both systems.²⁹⁴ Regardless, when marrying the two systems, it would follow that the corporation would be able to receive both the author’s exploitation and moral rights to the work based on the current U.S. works for hire law.²⁹⁵ Thus, TWDC could then have the same protections *droit moral* extends to the authors despite being a corporation.²⁹⁶

Another dilemma that arises with the merging of *droit d’auteur* and the U.S. copyright system is the duration of the author’s various rights.²⁹⁷ Though the exploitation rights under *droit d’auteur* expire at the same time as the U.S. copyright duration,²⁹⁸ the rights of attribution and integrity found in *droit mor-*

²⁸⁹ See C.P.I. art. L113-5; ADENEY, *supra* note 47, at 177. Translated, the statute simply states: “The collective work is, unless proved otherwise, the property of a natural or legal person under whose name it has been divulged. This person is given the author’s rights.” C.P.I. art. L113-5 (translated by author) (“*L’oeuvre collective est, sauf preuve contraire, la propriété de la personne physique ou morale sous le nom de laquelle elle est divulguée. Cette personne est investie des droits de l’auteur.*”). Ms. Adeney also notes that although the *Cour de cassation* (France’s Supreme Court) has recognized moral rights are available to legal entities, the *Cour d’appel* of Paris has contested this right. ADENEY, *supra* note 47, at 177.

²⁹⁰ HOLLIS & SIBLEY, *supra* note 283, at 14–17.

²⁹¹ See C.P.I. art. L121-1; ADENEY, *supra* note 47, at 177–78; Weiss, *supra* note 281.

²⁹² Compare C.P.I. art. L121-1, and ADENEY, *supra* note 47, at 177–78, and Weiss, *supra* note 281, with 17 U.S.C. § 201(b) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”).

²⁹³ 17 U.S.C. § 101.

²⁹⁴ Compare C.P.I. art. L121-1, and Weiss, *supra* note 281, with 17 U.S.C. § 201(b). Of course, under *droit d’auteur*, the natural-person author would also maintain rights in the creation. ADENEY, *supra* note 47, at 178.

²⁹⁵ See 17 U.S.C. § 201(b); C.P.I. art. L121-1; Weiss, *supra* note 281.

²⁹⁶ See C.P.I. arts. L111-1, L121-1; Berne Convention, *supra* note 91, art. 6bis; ADENEY, *supra* note 47, at 177–78; Weiss, *supra* note 281.

²⁹⁷ See *supra* note 174 (providing the language of C.P.I. art. L123-1). Compare C.P.I. art. L123-1, with 17 U.S.C. § 302.

²⁹⁸ See *supra* note 174 (providing the language of C.P.I. art. L123-1). Compare C.P.I. art. L123-1, with 17 U.S.C. § 302.

al are perpetual.²⁹⁹ The duration of these rights bears more resemblance to the duration of a trademark.³⁰⁰ In order to “Americanize” the duration of *droit moral*, a compromise could be struck, limiting the length of protection to extend so long as the copyright is active—similar to how a trademark can be protected so long as it is actively being used in commerce.³⁰¹ Therefore, Disney’s moral rights in Mickey Mouse should only be protected so long as Mickey continues to be entwined in TWDC’s personality.³⁰²

Thus, *droit d’auteur*—and more specifically, *droit moral*—provide the missing link between marrying U.S. copyright and trademark laws.³⁰³ When combined, these overlapping areas of law allow for a straightforward and cohesive way of extending protection to dual-status creations.³⁰⁴ When such a creation enters the public domain, trademark law should supersede based on a combination of personality theory and *droit moral*.³⁰⁵ Though this may limit some uses of the creation, the traditional trademark defenses still would apply.³⁰⁶ If a dual-status creation is famous, however, the Federal Trademark Dilution Revision Act of 2006 would amplify protection pursuant to the Act’s intent of protecting the goodwill generated by the creation.³⁰⁷ Similar to the right of integrity of *droit moral*, the Dilution Act would prevent uses that would harm the owner’s reputation.³⁰⁸ In this case, Mickey Mouse could continue to be protected from any uses that would damage TWDC’s goodwill and reputation while still being available for creative purposes in the public domain.³⁰⁹

²⁹⁹ See C.P.I. art. L121-1; ADENEY, *supra* note 47, at 169. The Berne Convention requires moral rights of an author to exist at least until the exploitation rights expire. See Berne Convention, *supra* note 91, art. 6bis. There is an exception so that countries (such as the United States) whose legislation “does not provide for the protection after the death of the author of all the [moral] rights . . . may provide that some of these rights may, after his death, cease to be maintained.” *Id.*

³⁰⁰ Compare C.P.I. art. L123-1, with 15 U.S.C. §§ 1058, 1127.

³⁰¹ Compare C.P.I. art. L123-1, with 15 U.S.C. §§ 1058, 1127.

³⁰² See 15 U.S.C. §§ 1058, 1127.

³⁰³ See VON LEWINSKI, *supra* note 67, at 45–46; Helfand, *supra* note 67, at 627. *But see* Foley, *supra* note 12, at 960–61; Liu, *supra* note 2, at 1428, 1430, 1433.

³⁰⁴ Compare Cotter, *supra* note 8, at 13 (quoting Netanel, *supra* note 51, at 387), with 15 U.S.C. § 1125(c).

³⁰⁵ See VON LEWINSKI, *supra* note 67, at 45–46; Cotter, *supra* note 8, at 7–15; Fisher, *supra* note 8, at 168; Helfand, *supra* note 67, at 627; Oguamanam, *supra* note 7, at 108–09; *Marketing Evolution*, *supra* note 64; *Mickey, The Universal Icon*, *supra* note 64. *But see* Foley, *supra* note 12, at 960–61; Liu, *supra* note 2, at 1428, 1430, 1433.

³⁰⁶ See 15 U.S.C. § 1115(b) (listing all potential defenses to trademark infringement).

³⁰⁷ See *id.* § 1125(c); MERGES ET AL., *supra* note 7, at 890 (quoting H.R. REP. NO. 104-374 at 3 (1995)); Foley, *supra* note 12, at 951; Liu, *supra* note 2, at 1438.

³⁰⁸ Compare ADENEY, *supra* note 47, at 181–83, and Cotter, *supra* note 8, at 13 (quoting Netanel, *supra* note 51, at 387), with 15 U.S.C. § 1125(c).

³⁰⁹ See Helfand, *supra* note 67, at 673–74. Compare ADENEY, *supra* note 47, at 181–83, and Cotter, *supra* note 8, at 13 (quoting Netanel, *supra* note 51, at 387), with 15 U.S.C. § 1125(c). *But see*

CONCLUSION

When a copyrighted work becomes established as a renowned trademark, it should not be treated the same as a normal work when it enters the public domain. Instead, trademark law should dictate the treatment of the formerly copyrighted work. This solution finds justification through the personality theory and the French *droit d'auteur*. Personality theory states that an author imbues some of his or her own personality into the work, and therefore, the author inherently owns that expression of his or herself. *Droit d'auteur* codifies this theory with its *droit moral*. Through this right, an author enjoys the perpetual protection of his or her work's integrity, preventing others from using the creation in ways that could damage the author's reputation. Additionally, numerous other countries have recognized moral rights, with most providing protection at least until the author's copyright has expired. Similarly, U.S. trademark law provides protections to a famous mark in order to protect the owner's reputation through the Federal Trademark Dilution Revision Act of 2006. The resemblance of the protections demonstrates the feasibility of a parallel protection to be extended to a famous trademark-copyright hybrid.

For TWDC, Mickey Mouse has become far more than a normal copyrighted character. He is plastered all over its merchandise, its investor-relations materials, and its products and services. He represents the brand at various functions, including making appearances at shareholder meetings and volunteer events. The character of Mickey Mouse is synonymous with TWDC. Consequently, he would be a prime example of a trademark-copyright hybrid that should fall into a specialized area of protection. By allowing this exception, the Walt Disney Company can continue to be the successful, family-oriented brand the world has come to expect.